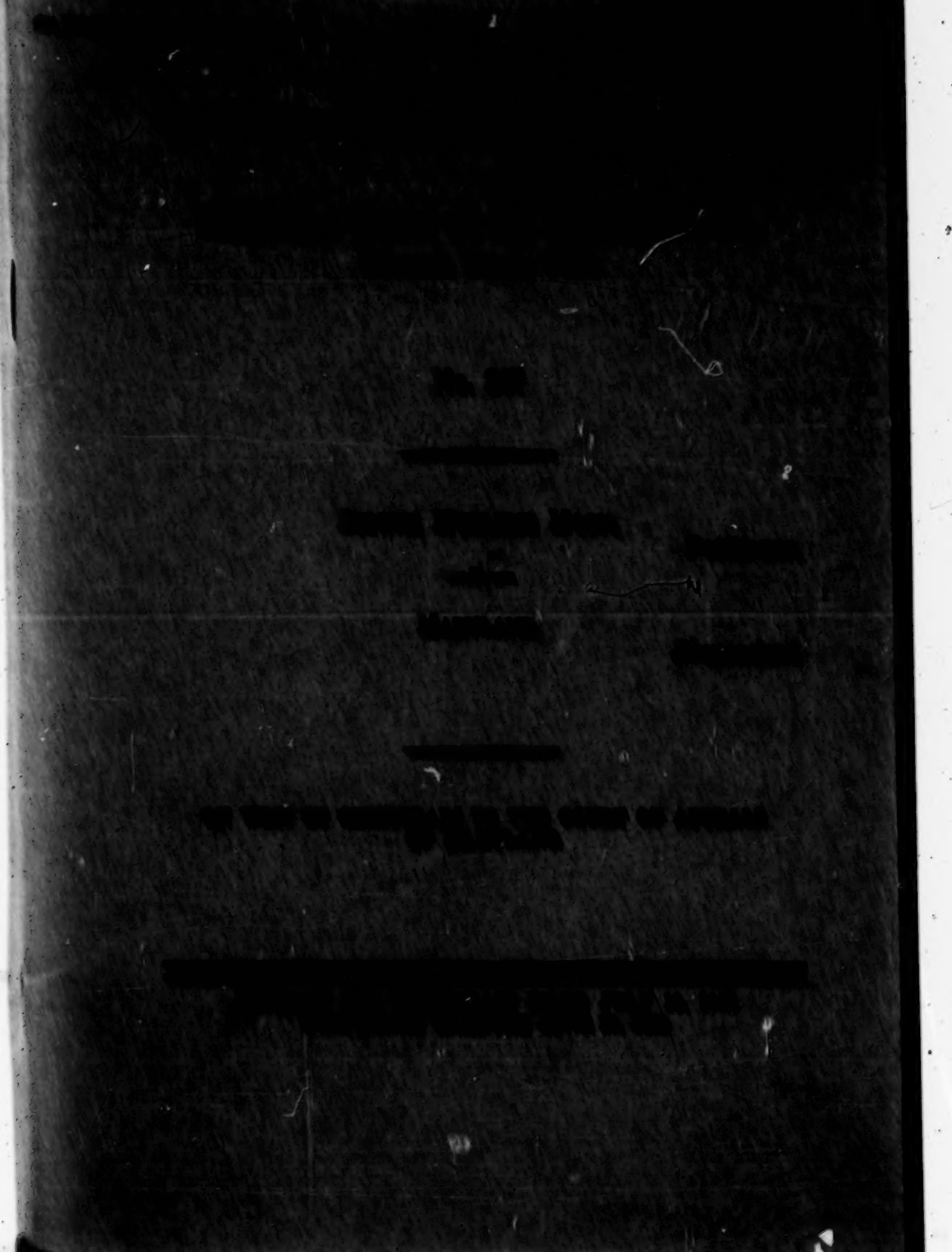

Supreme Court of the United States

OCTOBER TERM, 1969

No. 267

DENNIS MULLENE MOON,

Petitioner,

—v.—

MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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No. 6308 Criminal

STATE OF MARYLAND

vs.

DENNIS MULLENE MOON

DOCKET ENTRIES

ARMED ROBBERY; ATTEMPTED ARMED ROBBERY; ROBBERY; ASSAULT WITH INTENT TO ROB; ASSAULT AND BATTERY; LARCENY

June 16, 1964—Presentment: Indictment: True Bill filed.

August 31, 1964—Copy of Indictment handed to Defendant.

August 31, 1964—Arraigned. Plea not guilty entered by Judge Shure.

August 31, 1964—Defendant was advised about his right to have Counsel by Judge Shure, Mrs. Bobbitt reporting.

September 14, 1964—Defendant's plea of insanity filed, in No. 6307 Criminal.

September 15, 1964—Order of Court for examination filed in No. 6307 Criminal.

December 2, 1964—Defendant's motion for speedy trial filed in No. 6307 Criminal.

December 2, 1964—Defendant's motion to dismiss filed in No. 6307 Criminal.

December 2, 1964—Defendant's motion for discovery filed in No. 6307 Criminal.

December 8, 1964—Order of Court for discovery filed in No. 6307 Criminal.

DOCKET ENTRIES

December 16, 1964—States answers to motion for discovery filed in No. 6307 Criminal.

December 17, 1964—Hearing on Defendant's motion to dismiss before Judge Anderson, and motion denied.

December 17, 1964—Defendant waived re-arraignment before Judge Anderson.

December 17, 1964—Jury sworn and trial; Judge Anderson, presiding, Mrs. Shannahan reporting.

December 17, 1964—State abandons Count 6 of Indictment.

December 17, 1964—Was Defendant sane or insane at time of crime? Verdict sane.

December 17, 1964—Verdict guilty to 1st Count of Indictment.

January 7, 1965—Defendant was asked if he had anything to say before sentence.

January 7, 1965—Judgment that the Traverser, Dennis Mullene Moon, be confined in the Maryland Penitentiary for a period of Twelve (12) years. Sentence to begin as of January 7, 1965.

January 8, 1965—Commitment delivered to Sheriff.

February 5, 1965—Defendant's notice of Appeal filed.

February 9, 1965—Petition of R. C. Heeney, Attorney, for attorney's fee filed, in No. 6307 Criminal.

February 15, 1965—Order of Court for attorney's fee filed in No. 6307 Criminal.

March 22, 1965—Paupiers Affidavit filed.

March 22, 1965—Order of Court appointing Attorney filed.

DOCKET ENTRIES

March 26, 1965—Defendant's motion, Consent and Order from Court of Appeals extending time for transmitting record to May 24, 1965 filed.

June 1, 1965—Defendant's motion and Order of Court of Court of Appeals extending time for transmittal of record filed.

June 30, 1965—Transcript of Record filed.

L. T. Kardy—Attorney for Plaintiff

R. C. Heeney—Attorney for Traverser, by Court 9/14/64.
R. S. Bourbon, by Court 3-22-65

No. 7640 Criminal

STATE OF MARYLAND

vs.

DENNIS MULLENE MOON

DOCKET ENTRIES

FOR ROBBERY WITH DEADLY WEAPONS, ETC.

March	9, 1966	Presentment: Indictment: True Bill filed.
April	4, 1966	Copy of Indictment handed to defendant.
April	4, 1966	Defendant waives any defects in the re indictment.
April	4, 1966	Arraigned before Judge Anderson, Mrs. Black reporting. Plea not guilty.
April	4, 1966	Order of Court remanding defendant to Maryland Penitentiary filed in No. 7639 Criminal.
April	20, 1966	Motion for discovery and inspection filed. in No. 7639 Criminal.
April	25, 1966	Defendant's motion to dismiss filed in No. 7639 Criminal.
May	6, 1966	Hearing before Judge Anderson, Miss Wissenbach reporting.
May	6, 1966	Defendant's consent and Attorney, R. Bourbon withdraws appearance and Court appoints H. J. Noyes, Attorney.
May	10, 1966	Defendant's motion for discovery filed.
May	10, 1966	Defendant's demand for speedy trial filed.
May	16, 1966	Petition of R. S. Bourbon, Attorney and Order of Court for Attorney's fee filed in No. 7639 Criminal.

DOCKET ENTRIES

May	17, 1961	Order of Court granting motion for discovery filed.
June	3, 1961	State's answer to Defendant's motion for discovery and inspection filed No. 7639 Criminal.
June	6, 1961	Motion by defendant to consolidate this case with No. 7639 Criminal and motion granted.
June	6, 1961	This case tried with No. 7639 Criminal.
June	6, 1961	Jury sworn and trial Judge Pugh presiding, Mr. Henderson reporting.
June	7, 1961	Trial resumed before Judge Pugh, Mr. Henderson reporting.
June	7, 1961	Verdict guilty on 1st count of indictment; guilty on 6th count of indictment.
June	7, 1961	Defendant was asked if he had anything to say before sentence.
June	7, 1961	Judgment on 1st count of indictment, that the Traverser, Dennis Mulkene Mason, be confined in the Maryland Penitentiary for a period of twenty (20) years, sentence to begin as of June 2, 1961.
June	7, 1961	Judgment on 6th count of indictment, that the Traverser Dennis Mulkene Mason, be confined in the Maryland Penitentiary for a period of Ten (10) years. Sentence under count 6 of indictment to be suspended on condition that when defendant is released from sentence imposed on 1st count of indictment that defendant will remain on good behavior.
June	8, 1961	Petition for counsel fees filed in No. 7639 Criminal.

DOCKET ENTRIES

June	9, 1966	Order of Court denying examination as a defective delinquent filed in No. 7639 Criminal.
June	10, 1966	Committment mailed to Maryland Penitentiary.
June	13, 1966	Order of Court granting counsel fees filed in No. 7639 Criminal.
June	14, 1966	Defendant's notice of appeal to Court of Appeals filed.
June	23, 1966	Order of Court appointing R. A. Jacques, Attorney, on appeal, filed.
July	14, 1966	Defendant's motion for extension of time to submit record and Order of Court granting extension of 90 days to begin on date that order was filed, filed.
July	14, 1966	Defendant's petition and Order of Court for payment of costs of appeal filed.
August	15, 1966	Two (2) volumes of Transcript of Testimony, filed.
January	4, 1967	Defendant's petition for obtaining trial transcripts, pauper's affidavit, &c., filed.
September	5, 1967	Mandate from Court of Special Appeals, filed in No. 7639 Criminal. "Judgment Affirmed".
October	16, 1967	Copy of Writ of Certiorari from Court of Appeals to Court of Special Appeals, filed, in No. 7639 Criminals.
October	20, 1967	Copy of Docket Entries & record mailed to Court of Special Appeals.

T. T. Kardy & W. A. Linthicum, Jr., State's Attorney.

H. J. Noyes Attorney for Defendant By Court 5 6 66
R. A. Jacques Attorney for Defendant By Court 6 23 66

[Clerk's Certificate Omitted in Printing]

STATE OF MARYLAND
MONTGOMERY COUNTY, TO WIT:

Criminal No. 6308

The Grand Jurors of the State of Maryland, for the body of Montgomery County, upon their oaths and affirmations present that Dennis Mullene Moon late of said County, on the eighteenth day of May in the year of our Lord nineteen hundred and sixty-four at the County aforesaid, unlawfully with a dangerous and deadly weapon, to wit, a metal pipe, did rob Patricia M. Hinkle and violently steal from Patricia M. Hinkle, four hundred forty-six dollars, current money of the United States, being of the value of four hundred forty-six dollars, current money, altogether of the value of four hundred forty-six dollars, current money, of the goods and chattels, moneys and properties of Poch, Inc., a corporation, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

SECOND COUNT

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Dennis Mullene Moon on the said day, in the said year, at the County aforesaid, unlawfully did attempt, with a dangerous and deadly weapon, to wit, a metal pipe, to rob Patricia M. Hinkle and violently did attempt to steal from Patricia M. Hinkle, four hundred forty-six dollars, current money of the United States, being of the value of four hundred forty-six dollars, current money, altogether of the value of four hundred forty-six dollars, current money, of the goods and chattels, moneys and properties of Poch, Inc., a corporation, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

THIRD COUNT

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Dennis Mullene Moon late of said County, on the said day, in the said year, at the County aforesaid, unlawfully did rob Patricia M. Hinkle, and violently steal from Patricia M. Hinkle, four hundred forty-six dollars, current money of the United States, being of the value of four hundred forty-six dollars, current money, altogether of the value of four hundred forty-six dollars, current money, of the goods and chattels, moneys and properties of Poch, Inc., a corporation, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

FOURTH COUNT

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Dennis Mullene Moon, late of said County, on the said day, in the said year, at the County aforesaid, in and upon one Patricia M. Hinkle unlawfully did make an assault, with intent then and there her the said Patricia M. Hinkle in bodily fear and danger of her life then and there unlawfully to put, and certain goods and chattels, moneys and properties of the said Poch, Inc., a corporation, to wit, four hundred forty-six dollars, current money of the United States, being of the value of four hundred forty-six dollars, current money, altogether of the value of four hundred forty-six dollars, current money, then and there being, from the person and against the will of the said Patricia M. Hinkle, then and there unlawfully and violently to steal, take and carry away; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

FIFTH COUNT

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Dennis Mullene Moon, late of said County, on the said

day, in the said year, at the County aforesaid, in and upon one Patricia M. Hinkle did make an assault, and her, the said Patricia M. Hinkle did then and there beat, against the peace, government and dignity of the State.

SIXTH COUNT

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Dennis Mullene Moon, late of said County, on the said day, in the said year, at the County aforesaid, four hundred forty-six dollars, current money of the United States, being of the value of four hundred forty-six dollars, current money, altogether of the value of four hundred forty-six dollars, current money, altogether in excess of the value of one hundred dollars, current money, of the goods and chattels, moneys and properties of Poch, Inc., a corporation, then and there being found, did then and there unlawfully steal, take and carry away; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

s Leonard T. Kardy
State's Attorney for
Montgomery County

Criminal No. 7639

STATE OF MARYLAND

MONTGOMERY COUNTY, TO WIT:

The Grand Jurors of the State of Maryland, for the body of Montgomery County, upon their oaths and affirmations present that Dennis Mullene Moon late of said County, on the eighteenth day of May in the year of our Lord nineteen hundred and sixty-four at the County aforesaid, in and upon one Patricia M. Hinkle, unlawfully did make an assault with intent then and there her the said Patricia M. Hinkle unlawfully and wilfully to kill and murder, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

SECOND COUNT

ABANDONED BY STATE 6-7-66

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that Dennis Mullene Moon, on the said day, in the said year at the County aforesaid, in and upon one Patricia M. Hinkle, unlawfully did make an assault, and her the said Patricia, M. Hinkle, did then and there beat, against the peace, government and dignity of the State.

s/ Leonard T. Kardy
LEONARD T. KARDY
The State's Attorney
for Montgomery County

Criminal No. 7640

STATE OF MARYLAND

MONTGOMERY COUNTY, TO WIT:

The Grand Jurors of the State of Maryland, for the body of Montgomery County, upon their oaths and affirmations, present that Dennis Mullene Moon late of said County, on the eighteenth day of May in the year of our Lord nineteen hundred sixty-four, at the County aforesaid, unlawfully with a dangerous and deadly weapon, to wit, a metal pipe, did rob Patricia M. Hinkle, and violently steal from Patricia M. Hinkle, four hundred forty-six dollars, current money of the United States, being of the value of four hundred forty-six dollars, current money, altogether of the value of four hundred forty-six dollars, current money, of the goods and chattels, moneys and properties of Poch, Inc., a corporation, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

SECOND COUNT.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Dennis Mullene Moon late of said County, on the said day, in the said year, at the County aforesaid, unlawfully did attempt, with a dangerous and deadly weapon, to wit, a metal pipe, to rob Patricia M. Hinkle and violently did attempt to steal from Patricia M. Hinkle, four hundred forty-six dollars, current money of the United States, being of the value of four hundred forty-six dollars, current money, altogether of the value of four hundred forty-six dollars, current money, of the goods and chattels, moneys and properties of Poch, Inc., a corporation, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

THIRD COUNT.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Dennis Mullene Moon late of said County, on the said day, in the said year, at the County aforesaid, unlawfully did rob Patricia M. Hinkle and violently steal from Patricia M. Hinkle, four hundred forty-six dollars, current money of the United States, being of the value of four hundred forty-six dollars, current money, altogether of the value of four hundred forty-six dollars, current money, of the goods and chattels, moneys and properties of Poch, Inc., a corporation, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

FOURTH COUNT.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Dennis Mullene Moon late of said County, on the said day, in the said year, at the County aforesaid, in and upon one Patricia M. Hinkle unlawfully did make an assault, with intent then and there her, the said Patricia M. Hinkle in bodily fear and danger of her life then and there unlawfully to put, and certain goods and chattels, moneys and properties of the said Poch, Inc., a corporation, to wit, four hundred forty-six dollars, current money, altogether of the value of four hundred forty-six dollars, current money, then and there being, from the person and against the will of the said Patricia M. Hinkle, then and there unlawfully and violently to steal, take and carry away; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

FIFTH COUNT.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Dennis Mullene Moon late of said County, on the said day, in the said year, at the County aforesaid, in and upon one Patricia M. Hinkle did make an assault, and

her, the said Patricia M. Hinkle did then and there beat, against the peace government and dignity of the State.

SIXTH COUNT.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Dennis Mullene Moon, late of said County, on the said day, in the said year, at the County aforesaid, four hundred forty-six dollars, current money of the United States, being of the value of four hundred forty-six dollars, current money, altogether of the value of four hundred forty-six dollars, current money, altogether in excess of the value of one hundred dollars, current money, of the goods and chattels, moneys and properties of Poch, Inc., a corporation, then and there being found, did, then and there unlawfully steal, take and carry away; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

/s/ Leonard T. Kardy
LEONARD T. KARDY
The State's Attorney
for Montgomery County

orig to C. C. Montgomery Co. 161
cc—State's Atty
Atty Gen
Robert A. Jacques
File

MANDATE

COURT OF SPECIAL APPEALS OF MARYLAND

No. 161, Initial Term, 1967

DENNIS MULLENE MOON

v.

STATE OF MARYLAND

Appeal from the Circuit Court for Montgomery County
Filed: August 18, 1966
August 2, 1967: Per Curiam filed.
Judgment Affirmed.

* * * *

STATE OF MARYLAND, Set:

I do hereby certify that the foregoing is truly taken from the record and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this first day of September A. D. 1967.

Clerk of the Court of
Special Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE

FOR PUBLICATION

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

INITIAL TERM, 1967

No. 161

DENNIS MULLENE MOON

v.

STATE OF MARYLAND

CHILDS, E. MACKALL
(specially assigned)
MORTON
ORTH
THOMPSON
PRETTYMAN, DANIEL T.
(specially assigned)
JJ.

PER CURIAM

Filed: August 2, 1967

Dennis Mullene Moon, the appellant, appeals from a conviction for armed robbery in the Circuit Court for Montgomery County after a trial before a jury. He was sentenced to imprisonment in the Maryland Penitentiary for a period of twenty years.[1] Credit was given for the time served since the date of his arrest.

It appears that at a former trial the defendant was convicted of armed robbery, but before the decision became valid he elected to void the indictment under *Schow-*

[1] The appellant was simultaneously convicted of larceny and of assault with intent to murder upon which suspended consecutive sentences were imposed. There was no appeal from these convictions.

garrow v. State, 240 Md. 121, 213 A.2d 475. At the former trial he was sentenced to imprisonment for twelve years. The present appeal arises from the subsequent indictment and trial.

The question presented is: Does the due process clause of the Fourteenth Amendment of the Constitution of the United States, or the common law as applied in Maryland, preclude a greater sentence at the second trial than at the former.

Tate v. State, 236 Md. 312, 203 A.2d 882, and *State v. Barger*, 242 Md. 616, 220 A.2d 304, make clear that where an indictment is invalid, a defendant can be retried since he has not previously been put in jeopardy. It would seem obvious that in such an event his punishment could be greater than at the prior trial. Although the question of the validity of the indictment was not involved, in *Hobbs v. State*, 231 Md. 533, 191 A.2d 238, *cert. den.* 375 U.S. 914, 84 S.Ct. 212, 11 L.ed.2d 153, the Court of Appeals of Maryland held that on a retrial under the same indictment, after a reversal by an appellate court, the trial judge could impose a greater punishment than had been previously imposed. This doctrine insofar as it relates to retrials under the same indictment has been considered recently by three United States Courts of Appeal with differing results.

In *Mayano v. United States*, (1st Cir.) 374 F.2d 583, the first circuit held that a greater sentence could not be imposed. In *Patton v. North Carolina*, (4th Cir.) ——— F.2d ———, June 14, 1967, 1 Cr L. 2155 the fourth circuit also held that a greater sentence could not be imposed. In *Starner v. Russell*, (3rd Cir.) ——— F.2d ———, May 25, 1967, 1 Cr L. 2117, the third circuit held that a heavier sentence could be imposed. In the absence of an authoritative ruling by the Supreme Court of the United States, we shall continue to follow the rule as laid down in the Maryland cases, especially, where as here, the indictment has been declared void, as opposed to a new trial under the same indictment after reversal.

JUDGMENT AFFIRMED.

IN THE COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1967

No. 287

DENNIS MULLINE MOON

v.

STATE OF MARYLAND

DOCKET ENTRIES

Certiorari to the Court of Special Appeals of Maryland

Filed: October 11, 1967

November	28, 1967	Motion to advance case for argument filed.
December	6, 1967	Motion denied.
July	3, 1968	Judgment affirmed. Opinion by Hammond, C. J.
July	11, 1968	Petition for costs of fee filed.
July	16, 1968	Fee of $10.00 allowed.
July	17, 1968	Motion filed for transmittal of original record to Supreme Court of the United States.
July	18, 1968	Motion granted and record forwarded to Supreme Court.

IN THE COURT OF APPEALS OF MARYLAND

No. 287

SEPTEMBER TERM, 1967

DENNIS MULLENE MOON

v.

STATE OF MARYLAND

HAMMOND, C. J.
MARBURY,
BARNES
McWILLIAMS
SINGLEY
SMITH,
JJ.

OPINION BY HAMMOND, C. J.

Filed July 3, 1968

Dennis Mullene Moon was convicted of armed robbery and sentenced to twelve years. *Schowgurow v. State*, 240 Md. 121, gave him the opportunity to elect to have his indictment nullified, and he did. On retrial he was again found guilty of armed robbery and also of larceny and assault with intent to murder for which he had not been tried the first time. Judge Pugh of the Circuit Court for Montgomery County sentenced him to twenty years for armed robbery, with credit for the time he had served, and suspended ten-year sentences on each of the other counts. The Court of Special Appeals affirmed the judgment and sentence in *Moon v. State*, 1 Md. App. 669, on the authority of *Hobbs v. State*, 231 Md. 533,

cert. den. 375 U. S. 914 (1963), in which we held that after the convicted man had won a reversal on appeal the judge on retrial could impose a greater punishment than had been previously imposed.

We granted certiorari because since *Hobbs* we had decided *State* v. *Barger*, 242 Md. 616, the Court of Appeals for the Fourth Circuit had decided *Patton* v. *State of North Carolina*, 381 F. 2d 636 (1967), and the Court of Special Appeals of Maryland had decided *Reeves* v. *State*, 3 Md. App. 195.

Barger held that where there had been a regular trial, upon a valid indictment, at which the accused had been convicted of murder in the second degree but explicitly acquitted of murder in the first degree, his appeal and the granting of a new trial did not waive his right successfully to plead double jeopardy to the charge of first degree murder at the second trial. In answer to the State's reliance on *Hobbs* ("the Court hears the case as if it were being tried for the first time and considers the entire matters of verdict, judgment and sentence as if there had been no prior trial"), we said *Barger* and *Hobbs* were distinguishable, and added at p. 627:

> "But even if the cases were indistinguishable, the result would be the same, for, under the circumstances of this case, the rule with respect to double jeopardy is such as to preclude a retrial of the defendant at the instigation of the State for murder in the first degree."

The opinion went on to say (pp. 627-28) that:

> "The further contention of the State that the appeal by the defendant in the first *Barger* case from his conviction of second degree murder had the effect of waiving the question of double jeopardy, or barring a plea to that effect, as to the charge of first degree murder of which he was acquitted, based on the premise that the granting of a new trial completely nullified the prior trial, is not only unreasonable under the circumstances of this case, but is not supported by the cases in this and other states. The

> contention [that Barger's appeal was a waiver] is unreasonable (a) because to hold that the appeal and consequent granting of a new trial constituted a waiver would be inconsistent with the fact that the defendant sought only to reverse so much of the verdict as supported his conviction of second degree murder and (b) because the opening of the whole case for reconsideration would place too great a price on the right of an accused to appeal."

In *Patton* the Court said the question to be answered was whether a defendant may be sentenced to a longer term of imprisonment at his second trial than he received after his first conviction, vacated on constitutional grounds. Its answer was that under no circumstances can he be. Three reasons were given—denial of due process, lack of equal protection, and double jeopardy. The due process clause of the Fourteenth Amendment, said the Court, does not permit the "fiction" that a reversal on appeal wipes out all that went before, and that by appealing the accused is deemed to have assumed the risk of a greater sentence. The Court said (pp. 639-41):

> "the District Court [at 256 F. Supp. 225] declared that predicating Patton's constitutional right to petition for a fair trial on the fiction that he has consented to a possibly harsher punishment, offends the due process clause of the Fourteenth Amendment. It would confront the prisoner with the unhappy choice of either abandoning his constitutional right to a fair trial and serving out his prison term under the invalid sentence, or exercising that right under the hazard, in the event of a second conviction, of being treated as though the years of imprisonment already served had never occurred.
>
> "This is like the 'grisly choice' discountenanced in *Fay* v. *Noia*, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963). 'The law should not, and in our judgment does not, place the defendant in such an incredible dilemma.' *Green* v. *United States*, 355 U. S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

North Carolina deprives the accused of the constitutional right to a fair trial, then dares him to assert his right by threatening him with the risk of a longer sentence. It may not exact this price. Enjoyment of a benefit or protection provided by law cannot be conditioned upon the 'waiver' of a constitutional right.

* * * * *

"The District Court held that Patton's punishment could not be increased unless evidence justifying a harsher sentence appeared in the record, and that the State must bear the burden of showing that such facts were introduced at the second trial, since 'where the record disclose[d] no colorable reason for harsher punishment,' the effect would be to inhibit the constitutional right to seek a new trial. 256 F. Supp. at 236. We agree with the District Court that it is an impossible task for the prisoner to prove improper motivation of the trial judge. It is equally impossible, and most distasteful, for federal courts to pry into the sentencing judge's motivation to ascertain whether vindictiveness played a part.

"We do not think, however, that a defendant's rights are adequately protected even if a second sentencing judge is restricted to increasing sentence only on the basis of new evidence. We are in accord with the First Circuit, which has recently held that a sentence may not be increased following a successful appeal, even where *additional* testimony has been introduced at the second trial.

* * * * *

"... * * improper motivation is characteristically a force of low visibility. In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. Seldom will this policy result in inadequate punishment. Against the rare possibility of inadequacy, greater weight must be given to the danger inherent in a system permitting stiffer sentences on retrial—that the added pun-

ishment was in reaction to the defendant's temerity in attacking the original conviction. Even the *appearance* of improper motivation is a disservice to the administration of justice."

On equal protection the Court said (p. 642):

"If the State wishes to institute a system permitting upward revision of sentences, it must proceed upon a rational basis in selecting the class of prisoners it will subject to this threat. It may not discriminate in this regard against those who have availed themselves of the right to a fair trial. This is an arbitrary classification offensive to the equal protection clause."

On double jeopardy the Court's thought was (pp. 643-44, 645-46):

"Double jeopardy, rather than being a single doctrine, is actually comprised of three separate though related rules, prohibiting (1) reprosecution for the same offense following acquittal, (2) reprosecution for the same offense following conviction, and (3) multiple punishment for the same offense. * * *

* * * *

"* * * Thus, unless a defendant is held to waive this double jeopardy protection in seeking a new trial, a harsher penalty may not be imposed. And we have already declared, in Part II of this opinion, that we decline to predicate a prisoner's exercise of his right to seek a new trial on the fiction that he has 'waived' the benefits of his initial sentence, because of the restrictive effect this has on access to post-conviction remedies."

In *Reeves* the accused was convicted of rape and given life. The United States Court of Appeals for the Fourth Circuit vitiated his conviction and on his second trial he was sentenced to twenty years imprisonment, the maximum allowed by statute under the jury's verdict, with no allowance for the approximately six years he had served

under his first sentence. The Court of Special Appeals said (pp. 203-04):

> "In *Moon*, as here, the twenty year sentence imposed on retrial was the maximum allowed under the statute (Md. Code, 1967 Repl. Vol., Art. 27, Sec. 488). Credit, however, was given Moon for all the time he had served in jail following his arrest. Thus, the case at bar reaches us in a different factual posture than Moon, for, by giving no credit for the time Reeves had spent in jail under the first sentence, the lower court, by imposing the maximum sentence in the second case, in effect, sentenced him to serve twenty-six years in the face of a statute which limits the sentence to twenty years.
>
> "It is true that the Court of Appeals and this Court have reasoned that the granting of a new trial, whether because of a defective indictment or because of error in the first trial results in a *de novo* proceeding, and the lower court, on retrial, 'hears the case as if it were being tried for the first time, and considers the entire matters of verdict, judgment and sentence as if there had been no prior trial.' *Hobbs*, *supra*. But this theory or fiction does not obliterate the hard fact, present in this case, that if the sentence here imposed is allowed to stand, Reeves could be forced to serve twenty-six years in prison for the commission of a crime which carries with it a maximum sentence of twenty years."

The case was remanded for the imposition of a lawful sentence.

We perceive no present constitutional obstacle to continuing to follow the flat rule laid down in *Hobbs*. The Supreme Court has not disturbed increased sentences on retrial. It did not do so in *Hobbs*. *See also Stroud* v. *United States*, 251 U. S. 15, 64 L. Ed. 103 (1919) (in which, on retrial, a death sentence replaced a life sentence given at the first trial); *Robinson* v. *United States* (6th Cir. 1944), 144 F. 2d 392, *aff'd* 324 U. S. 282, 89 L. Ed. 944 (1945) (a death sentence replaced a life sentence). *See also Green* v. *United States*, 355 U. S.

184, 194, 2 L. Ed. 2d 199, 208 (1957), Note 15 (in which a jury's finding of second degree murder was held to be an implied acquittal of first degree murder which precluded again putting the accused in jeopardy for first degree murder)—"Stroud * * * is clearly distinguishable"; *Cichos* v. *Indiana*, 385 U. S. 76, 17 L. Ed. 2d 175 (1966). In *United States* v. *Tateo*, 377 U. S. 463, 12 L. Ed. 448 (1964), both *Stroud* and *Robinson* are cited as existing and viable authority. The Supreme Court denied certiorari in *Patton*, 390 U. S. 905 (1968), but at 389 U. S. 889 it also denied it in *United States ex rel. Starner* v. *Russell* (3rd Cir. 1967), 378 F. 2d 808, which had refused to follow *Patton* and had reached an opposite result.

We are unpersuaded that *Patton* is sound. There the Court enacted a flat prophylactic rule which it rationalized as constitutionally required, seemingly because it was convinced that out of bitterness, bias, spite or prejudice state judges on retrial would give increased sentences which bore no proper relation to the fair administration of justice, and that in the rare instances in which this was not so, the second sentences could not be found from the record not to have reflected such prejudice or improper motives. This attitude of knowing judicial pragmatism led to the Procrustean holding, which we think is unwarranted and undesirable in its absolute inflexibility.

No appellate court to our knowledge has followed *Patton* in finding a constitutional necessity for entire inflexibility,[1] although if reliance is put on double jeopardy this result is almost inevitable. *See* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L. J. 606, 611 (1965); *see also Retrial of the Successful Criminal Appellant: Harsher Punishment and Denial of Credit for Time Served*, 28 Md. L. Rev. 64 (1968).

[1] California, Oregon and New Jersey Courts have reached similar conclusions essentially as a matter of procedural fairness under state law. See People v. Henderson (Cal. 1963), 386 P. 2d 677; State v. Turner (Ore. 1967), 429 P. 2d 565; State v. Wolf (N. J. 1966), 216 A. 2d 586.

Various federal courts have rejected the view *Patton* took and have refused to follow its holdings. The Court of Appeals for the Second Circuit dismissed without particular comment as not warranting discussion the points that increasing a sentence on retrial violated the constitutional rights of the accused, under due process, equal protection and double jeopardy. *See United States* v. *Ellenbogen* (2nd Cir. 1966), 365 F. 2d 982, referred to in *Coke* v. *United States* (S. D. N. Y. 1968), 280 F. Supp. 97, 102. In *Coke*, Judge Cooper, after a thorough consideration of *Patton* and other federal cases held that, considering the additional unfavorable information which came to light in the presentence report following the third conviction as contrasted with the information appearing in the presentence report after the second conviction for the same crime, and considering lack of intention to punish the prisoner for taking an appeal from the second conviction, imposition of a ten-year sentence following the third conviction as opposed to a six-year sentence following the second conviction did not deprive the prisoner of due process, equal protection, or protection against double jeopardy.

Patton relied on *Marano* v. *United States* (1st Cir. 1967), 374 F. 2d 583-85, in which the Court held that an accused's right of appeal must be "unfettered" and that additional testimony at the retrial adverse to the accused did not justify the increased sentence. Unlike *Patton*, the Court observed that in some circumstances it might not be "inappropriate for the Court to take subsequent events [as disclosed in a new presentence report] into consideration, both good and bad."

In *United States ex rel. Starner* v. *Russell* (3rd Cir. 1967), 378 F. 2d 808, 810, 811-12, *cert. den.* 389 U. S. 889 (1967), Starner pleaded guilty to eight counts of forgery and received a sentence of two to six years. His conviction was vacated because he had not had a lawyer. On retrial he was convicted of the crimes to which he had pleaded guilty and given three and one-half to seven years, with credit for the time he had served, well within the statutory maximum. After the Pennsylvania County

Court and Supreme Court had denied him relief in his habeas corpus action, the federal District Court did so and vacated his conviction, holding the increased sentence to be unconstitutional because the sentencing judge's reasons for imposing it were "insufficient." The Court of Appeals reversed, saying:

> "The trial judge below concluded, 'No prisoner should be punished for obtaining a new trial nor for pleading not guilty.' However, the record does not disclose that he was.
>
> "* * * [To hold that the trial judge will certainly increase the sentence after a new trial] would seem to trespass the integrity of the trial judge who, upon hearing all the evidence, with the whole panorama of defendant's crime laid out before him, conscientiously passes sentence in accordance therewith, even though here the defendant did not take the stand nor call witnesses on his behalf. The sentence thus imposed by the trial judge cannot, in any sense, be said to be for his appealing, unless we again attribute to him a base motive—penalizing him for his appeal, conduct unworthy of the name of judge—rather than for his weighing and evaluating the measure of defendant's crime and passing sentence thereon, in the light of the wider, factual area encompassed by the trial which, in most instances, is far more revealing than those factual elements taken into consideration in the imposition of sentence upon a plea of guilty. * * *
>
> "* * * Undoubtedly, it would therefore seem to be the rule in the federal system that a trial judge, when a new trial is ordered, may impose a sentence greater than one he had earlier vacated, and that it is unnecessary to articulate the reason for any differentiation in the term of the sentence. Furthermore, it has always been the rule in both the federal and state system that leniency is always extended on pleas of guilty that is not extended when defendants go to trial and the petitioner, having had competent counsel, must have been aware of this

situation. Additionally, the fact that the judge, in sentencing the petitioner, adverted to this leniency in pleading guilty, in no wise affected the sentence he imposed.

"It is submitted it would be a flagrant trespass of an independent state judiciary, to question its discretionary judgment, in the imposition of a sentence, where the trial judge, in the possession of all the facts relative thereto, in a proceeding in a Federal court on a writ of habeas corpus—already ruled on by the highest tribunal of the state—would vacate the same, unless it clearly flouted constitutional standards of due process."

United States v. *White* (7th Cir. 1967), 382 F. 2d 445, 448, reached a similar result, saying:

"With respect to the defendant's first argument, we believe that when, as here, it appears in the record that the sentencing judge is not penalizing the defendant for having exercised his right to appeal, the imposition of a greater sentence upon reconviction does not constitute a denial of due process and that such action lies within the discretion of the district judge. Similarly, as to the defendant's double jeopardy argument, we do not believe that the fifth amendment prohibits different punishments upon reconviction for the same crime following a successful appeal when the punishment, whether imposed by the same or a different district judge, results from the judge's exercise of his traditional discretionary function of considering a variety of sentencing factors, many of which have no direct relationship to the crime itself.

"We are fully aware of the recent decisions of other courts, dealing with these and related questions, which have expressed views contrary in many respects to those expressed herein. We think, however, that the pronouncement of a constitutional principle as sweeping and inflexible as that discussed in certain of these decisions and urged here by the defendant should await the considered judgment of the

[illegible] improperly constituted. *Schaffer*, supra, was not to apply retroactively except for convictions which had not become final when the opinion was rendered.

State v. Madison, 240 Md. 265, held that any accused convicted or committed by such an improperly constituted jury had the right to have the indictment dismissed or his case retried without showing actual prejudice. *Smith v. State*, 240 Md. 616, held that there could be an intelligent and knowing waiver of the defects in an indictment or conviction by such an improperly constituted jury.

In *Hodge and Wisniewski v. State*, 240 Md. 682, we ruled that there need have been no challenge or objection below to such a defective indictment in order to take advantage of the constitutional defects.

In this context, this Court then ordered that the docket entries in all criminal cases in which an appeal had been taken but not perfected by the transmission of the record to and in this Court, pro tem, completed all such cases and all the criminal appeals that had been pending in this Court, subject to identical orders that in each such case the accused could file a motion to quash the invalid indictment or the technically invalid jury verdict, or elect to go forward with the pending appeal as the indictment or verdict were valid. To accomplish this the following procedures were ordered:

[illegible]

[illegible]

[illegible]

[illegible]

greater or less than the one, or ones, presently against him, within constitutional bounds.

"c. The accused is to be told that he can waive any defects in the grand or petit jury which indicted or convicted him, notwithstanding the unlawful composition of such jury.

"d. If the accused elects to accept the indictment or trial jury as valid, the appeal will proceed in the Court of Appeals in the usual way, on the other grounds of error claimed.

In the case before us, as in other similar cases, Moon was given the messages this Court said should be given him. He chose after an appropriate period of deliberation to have his indictment nullified. We think this, on the record, was an intelligent, knowing and formal choice, made with the understanding and agreement that, upon reconviction, he might receive an increased sentence to which he could not object if it were otherwise in order.

There was no constitutional necessity to make Schoonover retroactive at all. Johnson v. New Jersey, 384 U. S. 719, 16 L. Ed. 2d 882 (1966). Exercising our discretion, we chose to make it retroactive to all whose convictions had not become final. In so doing, we, in effect, afforded the condition that under the peculiar and limited circumstances of an accused accepted the benefits of Schoonover's selective retroactivity, he assumed the risk that his next sentence might be greater than the one he was voiding. The procedure was analogous to that under the new review of sentence law and Rule 35, and there was present the same express understanding and at least implied agreement that an increased sentence might result if the purely technical defect which produced an actual unfairness or prejudice to the convictions complained of was taken advantage of.

There is no indication that Judge Wright increased Moon's sentence because he had elected to have a new trial or for any other unworthy or improper motive. There is substantial indication that the second sentence reflected the extent to which the facts revealed at the second trial but not at the first, put Moon in a bad light

and showed him to be a greater threat to society than had first been thought. At the first trial the only conviction was for armed robbery. At the second trial, Moon was convicted of larceny and assault with intent to murder also. There was medical testimony at the second trial, not given at the first, of the shocking physical beating of the victim and its disastrous effects. Judge Pugh could have reimposed the original twelve-year sentence and given additional ten-year consecutive sentences for larceny and assault, or a total of thirty-two years, and Moon would not have had even an ostensible basis to complain. Instead, Judge Pugh chose to give twenty years for armed robbery and to suspend sentence on the other convictions. A sentence of twenty years for armed robbery is not only authorized by statute but is not an unusual, shocking or improperly punitive sentence.

We think there was no constitutional bar to the giving of the increased sentence and that the record supports factually its permissibility and propriety.

The judgment of the Court of Special Appeals is affirmed.

JUDGMENT AFFIRMED.

IN THE COURT OF APPEALS OF MARYLAND

No. 287

SEPTEMBER TERM, 1967

DENNIS MULLENE MOON

v.

STATE OF MARYLAND

MANDATE

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS, the case of DENNIS MULLENE MOON v. STATE OF MARYLAND came before you and wherein the judgment of the said Court of Special Appeals of Maryland was duly entered on the second day of August, 1967, as appears from the transcript of the record of said Court of Special Appeals of Maryland which was brought into the Court of Appeals of Maryland by virtue of a writ of certiorari dated October 10, 1967; and

WHEREAS, in the September Term, 1967, the said cause came on to be heard before the Court of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordered and adjudged on July 3, 1968 by this Court that the judgment be affirmed.

NOW, THEREFORE, THIS CAUSE IS REMANDED To You, in order that such proceedings may be had in the said cause in conformity with the judgment of this Court above stated as accord with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS the Honorable Hall Hammond, Chief Judge of the Court of Appeals of Maryland, the 2nd day of August, 1968.

J. Lloyd Young
Clerk
Court of Appeals
of Maryland

Costs of Briefs

Appellant	$ 92.90
Appellee	158.80

[fol. 11]

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

1st TRIAL - December 17, 1964

(MR. LOHM, Ass't State's Attorney)

Q Directing your attention to May 18th do you recall going to work for Poch Hardware on that date?

(PATRICIA M. HINKLE)

A No, I don't.

Q What do you remember, what is the last thing you remember prior to May 18th?

A That Sunday I remember watching part of Bonanza, and that's all.

Q And May 18th was a Monday?

A That's right.

Q Now, from the time when you watched part of [fol. 12] Bonanza on Sunday, May 17th, what is the next thing you remember after that?

A I remember my husband standing there, and I asked him if I had been in an accident. I thought I had been in a car wreck.

Q Where was this?

A It was in the hospital.

Q What hospital was this?

A Suburban Hospital.

Q And do you know what day of the week that was?

A I think it was on a Thursday.

Q And what were the nature of the injuries that you received?

MR. HEENEY: Objection.

THE COURT: I think this would be admissible to show where she was struck. Go ahead.

THE WITNESS: I was struck back here, behind my right ear, and then I had three to four stitches right in this eye, my eye was black, and it knocked several of my fillings out of my teeth.

BY MR. LOHM:

Q And you have not gone back to work since this happened?

A No, I haven't.

Q Are your under a doctor's care?

A Yes, I am.

[fol. 13] Q Who is the doctor?

A Dr. Peter Murphy.

Q What other doctors have you seen?

MR. HEENEY: Objection.

THE COURT: The charge in this case is armed robbery. Now, I think you can show where she was struck, and you certainly can show what she was struck with if the time comes to show that, and show who struck her. The fact that she was very seriously injured wouldn't have anything to do particularly with the armed robbery, other than the instrument that was used. I think she can describe the nature of her injuries in order to show the nature of the weapon that was used and the force that was applied. The Statute says with a dangerous and deadly weapon, and that means either dangerous or deadly weapon, either one. An unloaded pistol could be a dangerous weapon. What was the last question that was objected to? I think he asked what other doctors she had seen. Objection overruled.

MR. HEENEY: May I approach the bench, Your Honor?

THE COURT: Yes.

(Proceedings at the bench.)

MR. HEENEY: Your Honor, when the State's Attorney in his questioning went beyond the nature of the victim's injuries I believe he's doing it for purposes of inflaming the jury, and I believe he is in fact inflaming the [fol. 14] jury, and, therefore, I move to withdraw a juror to declare a mistrial.

THE COURT: The motion certainly will be overruled at this time, because she hasn't even answered the question. I think the question was what other physicians did she see. What do you proffer to show?

MR. LOHM: I would proffer to show

THE COURT: There is an assault and battery in this thing too?

MR. LOHM: Yes, sir.

THE COURT: So it would appear to me that under the assault and battery count you could certainly show the way she was beaten up at least. What do you say to that?

MR. HEENEY: I agree for purposes of proving the assault and battery he can go into that, and for the purpose of showing the nature of the injury. I think treatment and the fact she's not working now and got little children at home and unable to work all is a matter for sentencing, but using it during the course of a trial is only for one purpose, to inflame the jury.

MR. LOHM: Your Honor, what I proffer to show here I have an eye witness to a crime who has no memory of it and I have got to explain this.

MR. HEENEY: You did.

MR. LOHM: And I want her to identify the doctors who treated her so they will be properly qualified when [fol. 15] they walk in here to testify, and I proffer to show by their testimony what the nature of the injury was, and as I said in my opening statement why she cannot remember now. Now, I also want to go into with her what her present condition is at this particular time.

THE COURT: Her present condition is that she is sick, can't work.

MR. LOHM: That's right.

THE COURT: But after all, we're not trying the defendant for the fact that the complaining witness can't work, but I think so far as the assault and battery is concerned you can go pretty far in showing the injuries she received for the purpose of showing whether it was an aggravated assault or what it was. The jury might very well find him not guilty of robbery, guilty of an assault and battery. For the purposes of the fifth count of the indictment I think he is entitled to go into this.

MR. HEENEY: I'm not going to make any contest over the witness' lack of memory, I concede that she has no memory as a result of these blows. I concede that, and there is going to be no—

THE COURT: This is not a negligence case. I'll allow you some latitude in view of the fact there is an assault and battery. The question was were you treated by other physicians?

MR. LOHM: Yes, Your Honor.

[fol. 16] THE COURT: That was objected to, and the objection will be overruled.

(Proceedings resumed in open court.)

BY MR. LOHM:

Q Tell what physicians treated you originally?

A I don't remember the doctor there when I arrived at the hospital, but there was one there, and Dr. Creer took care of me, and Dr. Murphy came in and examined me, and then Dr. Sandler is my dentist, and he fixed my teeth.

THE COURT: As I understand, she suffered a complete loss of memory as a result of whatever occurred to her, is that correct?

MR. LOHM: Yes, Your Honor.

THE COURT: That's admitted by the defendant?

MR. HEENEY: That's admitted, Your Honor.

MR. LOHM: You may cross examine.

MR. HEENEY: I have no questions.

THE COURT: That's all.

* * * *

[fol. 134]

TESTIMONY OF DENNIS MULLEN POWERS MOON

DIRECT EXAMINATION

BY MR. HEENEY:

Q Tell the Court and ladies and gentlemen of the jury your full name please?

A Dennis Mullen Powers Moon.

* * * *

Q Directing your attention to the months preceding May 18th of 1964 were you employed by Poch Hardware?

A At one time, yes, sir.

[fol. 136] Q Did you go back there again?

A To the store?

Q Yes.

A Not for sometime after that.

Q When did you go back?

A On the day that this—I don't know, I think it's the 18th.

Q May 18, 1964?

A Yes, sir.

Q What did you go back there for?

A Well, I was leaving Maryland. I had trouble trying to get my roommate to cooperate with the rent and what not. Like he stated earlier that the rooms, everything was in quite a disorder, which was like this all the time, and i don't like filth and I don't like it like it was and I just couldn't stand it any longer. Besides this, I was told there was a chance that I could fight in Cuba, so that's my big dream anyway, so I went running down there. This is what I planned on doing.

Q Well now, do you remember what happened over there on May 18th?

A Well, not exactly. I know I went over there with the intent—I did make this weapon, and I went over there, but I went there, I wanted to do something harmful in that store, destructive. I wanted to break his windows [fol. 137] and knock the shelves down, and if he did anything to me I tried to stop him. I wanted to do harm to anything in that store I could possibly do harm to and I wanted to destruct.

Q Did you hit that girl?

A I guess so. I don't remember doing this. I must have been insane to do it. I don't remember actually this happening. I know it happened, I was there, definitely. When it happened I just stood there. I looked at her, I took off, I stopped, I didn't want this, I didn't want to hurt her, I didn't want to do anything to her.

Q Did you like her?

A I liked her. She was the only one decent at the store, she was very civil. I started to go back to her and

it was some people coming down the walk and I knew what I had done, so I just ran.

Q Did you take anything from her?

A No, I didn't take anything.

Q You're accused of taking that bag of money?

A I realize this, but I didn't have anything except the pipe.

Q Now, did you run up and down like the witness described?

A Yes.

Q Why did you do that?

A I was undetermined whether to stay there, because she was bleeding and I didn't—like I said, I didn't want [fol. 138] to hurt her none, and anyway I just ran back there. I know what I did, and what my past and all refers to, I knew that I didn't have much of a chance. I thought she was dead there for a minute, so I just took off running.

Q Did you see anybody else coming near you?

A Well, just a person was coming out of the Food Fair there. I don't think he was coming, I think he was already out. He was just sort of coming in that direction. I think he worked out in front of the place, and there was another person coming down. I didn't pay any attention, I just saw people starting to come down the walk. I don't think people had actually realized what had happened, they were still startled at the idea.

Q You say your past, do you have a bad past?

A Well, I feel it is.

Q Tell us, not your life history, tell us of any convictions you may have against you?

A Well, I got a bad discharge.

Q From where?

A I was in the Army and I got it. I was doing service time.

Q What did you get the bad conduct discharge for?

A Burglary.

Q Of what?

A A P.X.

[fol. 139] Q Post exchange?

A Yes, sir.

Q Anything else?
A California I got picked up for grand theft, auto.
Q Anything else?
A Yes. I got three years for taking a car across the state line, Federal.
Q Is that it now?
A That's all.
Q Have you had any crimes of violence against you?
A No, sir.
MR. HEENEY: Cross examine.

CROSS EXAMINATION

BY MR. LOHM:

Q How old are you?
A 23.
Q You lived over there with Foote?
A Yes, sir.
Q And on the morning of May 18th did you make this pipe; I show you State's Exhibit No. 3?
A Yes, sir.
Q Tell the Court and the jury how you put that tape on that pipe?
A Well, I just taped it up there.
Q Where did you get the tape?
[fol. 140] A Out of my car.
Q Why did you tape the pipe?
A That's a good question. I was afraid that somebody was going to try and stop me when I was going to tear up the store, and I didn't want to hurt anybody too bad with it.
Q When did you decide to tear up the store?
A I don't know, the first thing that morning.
Q On the morning of May 18th?
A Yes, sir.
Q Then you made the pipe?
A Yes, sir.

• • • •

A My husband and I and my two children were waiting in the car to go get our polio vaccine and that is the last thing I remember before that date.

Q That was on what day?

A That was on a Sunday evening.

Q On a Sunday. And what is the next thing you remember after the Sunday before May 18, 1964?

A I remember I woke up in the hospital, and I thought I was in a car accident.

Q Do you recall what date or day that was?

A It was either Wednesday or Thursday. I don't remember.

Q Following that Monday?

A Yes.

Vol. 11 Q And what injuries did you have, Mrs. Hinkle?

A I had a cut up over my left eye. I had four stitches in there. My face was black and I lost—I had a lot of dental work had to be done, and I had to go to Children's Hospital to have that done. I had a big knot on the back of my head, on the left.

Q And what type—you say you lost something?

A Yes, my hair.

Q Anything else?

A No. I just lost several fillings out of my teeth. I'm still going to the doctors.

Q And what doctor are you going to at the present time?

A Dr. Osborne.

Q And do you recall what hospital you woke up in?

A Suburban.

Q What doctor treated you at Suburban when you were there?

A Dr. Carver.

Q And were you ever seen by a Dr. Peter Murphy?

A Yes.

MR. NOYES: I object, Your Honor. We are not trying a civil negligence case. Show that she had injury; that is all he has to show.

THE COURT: She has answered the question. Objection overruled.

BY MR. WOOD:

Q How long were you treated for the injuries you [fol. 15] sustained on the 18th of May?

MR. NOYES: Object.

THE WITNESS: I'm still being treated.

THE COURT: Just a minute.

You object?

MR. NOYES: Yes, sir.

THE COURT: Why?

MR. NOYES: Because, Your Honor, the State is trying to show assault and battery and she sustained injury on May 18, and it doesn't make any difference whether it was a cut on the finger or hit her arm.

THE COURT: The State proffer to prove this up and connect it with the defendant?

MR. WOOD: Yes, we do, Your Honor.

THE COURT: All right; objection overruled.

BY MR. WOOD:

Q Mrs. Hinkle, do you remember carrying any money to the Maryland National Bank on the 18th of May, 1961?

A No, sir, I do not.

Q Do you remember anything on that date?

A I remember absolutely nothing.

MR. WOOD: Your witness.

. . . . . .

[fol. 19] BY MR. WOOD:

Q Now, did you see Mrs. Hinkle leave?

BERNARD E. POCH,

A Yes.

Q And after you saw her leave did you have an occasion to see her thereafter?

A Yes, I did. I found her out in front of the Giant Food Store on the ground. She was bloody; she had been hit. Knees were all cut up. She was incoherent—

THE COURT: Keep your voice up.

THE WITNESS: She was incoherent, she was not aware exactly where she was. She knew someone had hit her.

[fol. 32] (MR. WOOD)

Q When you saw her she was—

(MR. POCH)

A Yes, I personally saw her laying sprawled out on the sidewalk, blood all over her.

MR. WOOD: That is all.

MR. NOYES: I have no further questions.

(Witness leaves the stand)

MR. WOOD: Harry Ross.

WHEREUPON,

HARRY E. ROSS

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WOOD:

Q Would you state your name and address, please, sir?

A Harry E. Ross, 12503 Scarlet Lane, Bowie, Maryland.

Q And how are you employed?

A I work for the F. O. Day Company, Rockville, Road construction.

Q And Mr. Ross, on the 18th of May, 1964, how were you employed on that date?

A I was working for the F. O. Day Company.

Q Now, did you have an occasion on the 18th of May, 1964, at approximately eleven thirty a.m. to be in the Rockville area?

A Yes, sir.

Q And where were you in the Rockville area?

A I was in the shopping center, Congressional Plaza.

[fol. 33] Q Is that in Montgomery County?

A Yes, sir.

Q Were you walking or riding?
A I was in my truck riding.

. . . .

[fol. 34] Q Would you tell the jury just what you saw?
A Well, I was just about at this position (indicates) when I saw a man that had been going in this direction (indicates) stop, turn and come back a couple steps and bend over, immediately got up again and started running. He ran down this way. (Indicates)
Q What was he bending over?
A I couldn't—he just bent over on the sidewalk, I don't know. I didn't see anything that was on the sidewalk near him.
Q And what did this man do, other than lean over, if anything?
A Leaned over and then straightened up and turned and started running, and at that time I noticed that he had, looked like a broom handle at the time, a piece of wool he had laid in the palm of his hand and run it up his arm and tucked it into his side as though he were trying to conceal it, and when he had stopped to make that turn, when he started running I noticed up the sidewalk, in front of the Giant Food Store, that there was a woman laying on the sidewalk with her head towards the store and feet towards the sidewalk—towards the curb, and I assumed then that—
MR. NOYES: Object to what he assumed, Your Honor.
[fol. 35] THE COURT: Yes, don't assume.

. . . .

BY MR. WOOD:

Q What was he doing with his other hand or arm?
A After he straightened up and started running he had it up in a folded position with it holding into his side, and he just—good army doubletime is what he was running. He wasn't running fast.
Q Now would you show the direction by your pointer again where this man went and where you went?
A Yes. He came around, came in behind the bank and came down Congressional Lane. I came out, came out into the roadway and I followed him.

Comes back in here (indicates) this—there is an entrance off Congressional Lane that comes in around this way. (Indicates) He turned in there, came on around (indicates) came right on down to the bowling alley, went in the back of the bowling alley. I followed him in my truck, came right on around (indicates) right at the [fol. 36] corner of Western Auto, and that is where I saw him throw the object that he had in his right hand in the trash bin. And I came out, on around and I parked back of the bowling alley. At the time I was on radio contact with our office and Mr. Day told me not to go in the bowling alley. I was going to go in, because there is an entrance comes out the other end. Mr. Day said do not go in, he may be armed. I said, well, what should I do, sit here and let him run out of the other door?

BY MR. WOOD:

Q What did you do, Mr. Ross?

A I started to back away from the back of the bowling alley this man came out, the same man I saw going in came out of the back of the bowling alley minus the shirt he was wearing.

He ran out across this parking lot into the apartments—through the apartments, not into the building, just through the grounds.

[fol. 37] Q And did you see him thereafter?

A Yes, I saw him as he went into the woods near the Woodmont Country Club, and ran into the woods. I didn't go into the woods. And that is the last I saw of him.

Q You may resume your seat, Mr. Ross.

(Witness resumes the stand)

(State's Exhibit No. 1 was so marked for identification.)

BY MR. WOOD:

Q I show you what has been marked State's Exhibit

Number One, Mr. Ross, and ask if you have ever seen that?

A Yes, sir.

Q And where did you first see that?

A I saw that—when I knew it was a piece of pipe—when I went back with the officers to search the rubbish pile behind the Western Auto Store. At that time we [fol. 38] found out it was a piece of pipe

Q You testifying that this is what was thrown in the trash?

A Yes, sir.

. . . . .

Q I show you what has been marked State's Exhibit Number Three and ask if you can identify that?

A Yes, sir.

Q And what is that?

A That was the shirt that he was wearing the day I saw him.

. . . . .

[fol. 39] Q Now, what else was this man wearing?

A He was wearing a pair of gray twill work trousers and a blue baseball cap.

(State's Exhibit No. 4 was so marked for identification)

Q I show you State's Exhibit Number Four and ask if you can identify that, sir?

A Yes, sir. That is the cap he was wearing.

Q And at any time during the time that you had this man in sight was that hat removed?

A No, sir—I take that back. After he ran into the woods near the Woodmont Country Club, when he first [fol. 40] disappeared in the woods, he had the hat on, and there was a break in the foliage and the hat wasn't on.

. . . . .

Q Now, Mr. Ross, do you see in the courtroom the man that you chased from of the Giant to the Woodmont Country Club?

A Yes, sir.

Q Where is he?

A Sitting right behind you, sir.

Q Would you describe him?

A Yes, sir. He is fair complected, light hair, five [fol. 41] feet eight or nine.

MR. WOOD: Like the record to show that he has identified the defendant, Your Honor.

REDIRECT EXAMINATION

* * * *

[fol. 55] BY MR. WOOD:

Q Mr. Ross, you testified that this looks like on cross-examination looks like the blue shirt that you saw the defendant wearing?

A Yes, sir.

Q And did you ever see this shirt other than on his person?

A Yes, sir.

Q Where did you find it?

A I was with the Montgomery County Detectives when it was found in the bowling alley.

* * * *

[fol. 61] THE COURT: Call the next witness. Who is the next witness, Mr. Wood?

MR. WOOD: Two more doctors.

MR. NOYES: You didn't call any doctors last time.

[fol. 65] MR. WOOD: I don't know.

MR. NOYES: Well, I'm telling you.

THE COURT: You didn't try the case before, did you?

MR. WOOD: No, I didn't try the case. I didn't see this transcript.

THE COURT: Who is your next witness?

MR. WOOD: Either Dr. Carver will be first.

THE COURT: Are they here?

MR. WOOD: Yes.

THE COURT: Do you have any objection to this doctor?

MR. NOYES: We are objecting to any medical testimony, because it wasn't used the last time. We weren't

notified they were going to call any doctors until about two hours ago.

If the State wanted to use doctors, should have notified me a week ago, gave me a chance to prepare for it.

THE COURT: What is the name of the doctor?

MR. WOOD: CAREER, I believe.

THE COURT: Well, the record in this case shows that the answer to the motion for discovery and inspection was filed on June 3, 1968, and certification on it was mailed to you.

MR. NOYES: I am certifying to the Court I did not get a copy. I am sure it was oversight.

THE COURT: You were apprised of the answer to the motion for discovery and inspection before twelve o'clock today, before the trial started?

MR. NOYES: Yes, sir.

THE COURT: You had no objection at that time?

MR. NOYES: Pardon?

[fol. 66] THE COURT: You raised no objection at that time to going to trial?

MR. NOYES: No, sir. But I did check with Mr. Wood as to certain names, and certain names I was told wouldn't be used, and I didn't know which ones they were.

THE COURT: It appears from the record that Dr. Roscoe Career's name is on this answer for motion for discovery and inspection; the case was called at one thirty-five or one forty-five and I asked you if you were ready. You said you were ready.

Objection overruled.

Call the doctor.

* * * * *

J. ROSCOE CAREER

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[fol. 67] BY MR. WOOD:

Q Would you identify yourself, please, sir?

A I am Dr. J. Roscoe Career, on the surgical staff at Suburban Hospital.

MR. WOOD: I understand that the defense will stipulate to his qualifications.

MR. NOYES: What is he, a general practitioner?

THE WITNESS: I am a general surgeon.

MR. NOYES: We will stipulate he is a qualified general surgeon.

BY MR. WOOD:

Q Now, doctor, directing your attention to on or about May 18, 1964, did you have occasion to attend one Patricia Hinkle?

A I did.

Q What date did you first see her?

A On May the 18th.

Q Do you recall what time you first saw her?

A I think it was between four thirty and five o'clock in the evening.

Q And where did you first see her?

A I saw her in the private room, or in the hospital, in a room in the hospital.

Q Would you describe her condition on that date and time?

A When I first saw her she had a bandage over her head and the left eye was covered and she was complaining of a lot of headaches. She was rather confused, disoriented.

[fol. 68] Q How long did you attend her, doctor?

A I attended her in the hospital until she was discharged on the 22nd, and I saw her in my office after that.

Q And how long did you see her in your office after that?

MR. NOYES: Your Honor, we object to any further testimony along these lines as being irrelevant.

THE COURT: Objection overruled.

THE WITNESS: I last saw her on August the 6th of '64. July 6th, excuse me. July 6th of '64.

BY MR. WOOD:

Q And when you examined her, doctor, in the Suburban Hospital, would you describe what injuries, if any, she had?

A She had a deep laceration over the left eyebrow, with marked hemorrhage around the eye.

She had a contusion behind the right ear.

She had she also had an abrasion of the left knee.

And then she had concussion, cerebral concussion.

Q And you say you discharged her on July 6, 1964?

A That is the last time I saw her as a patient. At the time she was referred back to Dr. Peter Murphy, who had also seen her in the hospital.

MR. WOOD: Your witness.

CROSS-EXAMINATION

BY MR. NOYES:

Q Doctor, do you know whether or not, of your own personal knowledge, whether she received these injuries from being struck by a car or otherwise?

[fol. 69] A I do not.

MR. NOYES: No further questions.

THE COURT: Step down, doctor.

(Witness leaves the stand)

MR. WOOD: Call Dr. Murphy.

THE COURT: Call your next witness, Dr. Murphy is not here.

MR. WOOD: Call again Dr. Beaven.

(Pause in proceedings while bailiff leaves the court room to summons witness)

MR. WOOD: Approach the Bench, Your Honor?

(Bench conference reported as follows):

MR. WOOD: I understand that Dr. Beaven is not out, however, Dr. Peter Murphy, I understand from our detectives, was served on Saturday; I believe by Detective Cobb. He is not here.

MR. NOYES: Use him tomorrow morning. Got to morrow morning.

THE COURT: These doctors will corroborate Dr. Carver's testimony?

MR. WOOD: Substantially.

THE COURT: That is about the substance of it?

MR. WOOD: Yes.

THE COURT: I don't think you would have to have them. I would hate to issue an attachment for them. They are busy doctors.

MR. WOOD: Well.

THE COURT: Call them back tomorrow. Call them [fol. 70] when you get through tonight, see if you can't get them here in the morning.

MR. WOOD: All right.

* * * *

DIRECT EXAMINATION

BY MR. WOOD:

Q Would you identify yourself, officer?

A Officer P. F. C. Albert R. Owen, Montgomery County Police, in traffic squad, stationed in Rockville.

Q Were you so employed on the 18th of May, 1964?

A Yes, sir, I was.

Q I show you what has been marked for identification State's Exhibit Number One, ask if you can identify that, sir?

A Yes, sir.

Q Where did you first see that?

A That was in a box at the rear of Congressional Plaza.

Q And what time, if you recall, did you find that on the 18th of May, 1964?

[fol. 71] A It was approximately eleven thirty, eleven thirty-five a.m.

Q And what did you do with that pipe?

A I picked that pipe out of the box using my little finger, sticking up in the hollow end, and I immediately turned it over to Detective Cobb.

* * * *

[fol. 74] DIRECT EXAMINATION

BY MR. WOOD:

Q Would you identify yourself, officer?

[fol. 75] A Corporal Ralph Cooley, Montgomery County Police, assigned to the Rockville Station.

Q Were you so employed on the 18th of May, 1964?

A Yes, I was.

Q Officer, I show you what has been marked as State's Exhibit Number Four for identification and ask if you can identify that?

A Yes, sir.

Q And where did you first see that?

A Lying in an open field to the rear of the Congressional Shopping Center here in Rockville. I would say it was approximately four, four hundred fifty yards to the rear of this shopping center.

* * * *

[fol. 76] Q And is that the same cap that you turned over to Detective Cobb?

A Yes, sir.

* * * *

[fol. 84] (BY MR. WOOD)

Q I show you what has been marked for identification State's Exhibit Number Eight; ask if you can identify that, sir?

(DETECTIVE JAMES R. COBB)

A Yes, sir.

[fol. 85] Q And when and where did you first see that?

A I saw this on the 19th day of May at the apartment that was rented by Russell Allen Foote and Dennis Mullene Moon, 11358 Evans Trail, Greenbelt.

Q Now, you say this apartment was rented by Dennis Moon and Mr. Foote?

A Yes, sir.

Q And who was there when you arrived?

A Mr. Foote went with us.

Q And you say Mr. Foote went with you to the apartment?

A Yes, sir.

Q And where was this found?

A In the waste basket in the kitchen.

Q And what did you do with it then?

A I took custody of it and sent it to the FBI, Agent Duckett.

Q Did you receive it back from Agent Duckett?

A Yes, sir, I did.

Q And did you then take it again to the FBI Lab?

A Yes, sir, I did.

* * * *

[fol. 86] Q And what initially led you to Mr. Foot?

A The laundry mark in that blue shirt. The primary investigation revealed that Dennis Mullene Moon was living with one Russell Allen Foot at that address.

Q And what is on this shirt to believe that Mr. Foot might be connected with it?

A It is stamped on there in the laundry marking, either one or i, dash, F-O-O-T.

Q And that led you to eventually Mr. Foot's roommate, Mr. Moon?

A Yes, sir, and the investigation that he was a former employee of Poch Hardware.

(State's Exhibit Numbers 8, 10 & 11 were so marked for identification)

Q Officer, I show you what has been marked State's Exhibit Number Nine for identification and ask if you [fol. 87] can identify that?

A Yes, sir. This was a sample of head hair taken from Patricia M. Hinkle at seven fifteen p.m., August 31st, 1964.

* * * *

Q Is that the same specimen that you received back from Agent Clark?

A Other than the marks of identification; yes, sir.

Q I show you State's Exhibit Number Ten for identification and ask if you can identify that?

A Yes, sir, this is a sample of head hair taken from Dennis Mullene Moon, seven fifty p.m. on the 28th day of August, 1964.

Q And who was present when that was done?

A Sergeant Thear and myself.

Q And what did you do with that?

A I submitted it to the FBI Laboratory.

* * * *

[fol. 96] DIRECT EXAMINATION

BY MR. WOOD:

Q Would you identify yourself, sir?

[fol. 97] A My name is Morris Samuel Clark, and I am a special agent for the Federal Bureau of Investigation assigned to the FBI Laboratory in Washington.

* * * *

Q Agent Clark, I again show you State's Exhibit Number One, ask if you have ever seen that?

A Yes, I have.

Q And do you recall when you saw that, sir?

[fol. 98] A Saw it first on April 22, 1966, in the FBI Laboratory.

Q And did you examine this article?

A Yes.

Q And what, if anything, did you find?

A Well, found that it was wrapped with tape; I made an examination involving the tape.

* * * *

BY MR. WOOD:

Q Agent, I show you what has been marked State's Exhibit Number Eight, ask if you ever seen that?

A Yes, I have.

Q When did you see that, sir?

A On April 22, 1966, I received it at the same time as I did the length of pipe.

[fol. 99] Q And what were your findings as to that article?

A I compared the end of the—the outer end of the tape, the partial roll of tape, with an end of the piece of tape on the pipe.

Q And what were your findings?

A I found that the ends matched, under the microscope, and I concluded that therefore that the tape on the pipe and the tape represented by State's Exhibit Eight / Two—

Q Eight.

A Eight, State's Exhibit Eight, were originally adjoining portions of the same roll of tape.

* * * *

[fol. 115] Q What findings did you make?

A I compared the two pieces of tape, that on the pipe, the partial roll, and I concluded that they were one continuous, from the same roll.

* * * * *

[fol. 121] DIRECT EXAMINATION

BY MR. WOOD:

Q Agent, would you give your full name and your address, please?

[fol. 122] A My name is Philip W. Conover; my address is 304 Curran Drive, Forest Heights, Maryland.

Q And by whom are you employed?

A By the Federal Bureau of Investigation.

Q And where are your official headquarters?

A Second and D Streets, Southwest, Washington, D. C.

Q And what is you official title and your duties?

A My official title is fingerprint examiner. My duties are to examine evidence submitted by the various offices of the FBI, as well as other duly constituted law enforcement agencies, for latent prints and—

* * * *

[fol. 127] BY MR. WOOD:

Q Now, what was the result of your examination of the inside of this tape and—which is State's Exhibit Number One, and State's Exhibit Number Seventeen?

A The fingerprint appearing on the sticky side of one of the pieces of tape on State's Exhibit Number One, and the inked impression in the left middle finger block of State's Exhibit Number Seventeen, which bears the name Dennis Mullene Moon, are impressions made by one and the same finger.

* * * *

[fol. 141] MR. WOOD: Your Honor, I believe the testimony from yesterday will show that Agent Robert E. Duckett is at this time deceased.

THE COURT: That is conceded, isn't it, Mr. Noyes?

MR. NOYES: No question about that, Your Honor.

[fol. 142] (State's Exhibit No. 20, having previously been so marked, was received in evidence)

(Whereupon, a gentleman takes the stand)

MR. WOOD: Your Honor, this is testimony of Robert E. Duckett, beginning at page one hundred fourteen, State's Exhibit Number Twenty.

By Mr. Lohm: Question: Tell us your name, please?

GENTLEMAN ON THE STAND: Robert E. Duckett.

MR. WOOD: And by whom are you employed?

GENTLEMAN ON THE STAND: I am employed by the Federal Bureau of Investigation. My duties are to examine hairs, fibers, textiles and related materials submitted to the Laboratory in criminal cases.

* * * *

[fol. 145] * * * and as a result of my examination I concluded that the tape on State's Exhibit Three came from the roll of tape designated State's Exhibit Six.

* * * *

[fol. 152] MR. WOOD: Question: Now, what comparisons did you make?

GENTLEMAN ON THE STAND: On receiving the shirt I removed all of the foreign debris adhering on the garment and I examined this foreign debris that I removed, determining what was in the debris, and after

I received known hair specimens which have been designated State's Exhibit Seven, I compared the human hairs that I found in the debris from State's Exhibit Four with the known hair samples that were submitted to me and which have been designated State's Exhibit Seven.

MR. WOOD: Please the Court, if the defense will stipulate that State's Exhibit Three in this trial is the same as State's Exhibit Number Seven at the former trial—

MR. NOYES: I believe that is right, Your Honor.

MR. WOOD: And what conclusion did you reach from your examinations?

GENTLEMAN ON THE STAND: In the debris from the shirt, State's Exhibit Four, I found a red hair and a red-brown hair from the scalp area of a Caucasian. I [fol. 153] compared these two hairs with known hairs from each of these three samples. I found that the two hairs that I described as having been found in the debris from State's Exhibit Four were similar to hairs in the known samples, and which were submitted to me as having come from the head of—

(Pause in proceedings while Messrs. Wood and Noyes look through papers together)

MR. WOOD: By Mr. Heeney: Object to that; that is hearsay.

Mr. Lohm: Your Honor, this is in evidence.

The Court: Let him look at the bottle.

By Mr. Lohm: Go ahead.

GENTLEMAN ON THE STAND: Which were purported as having come from the head of Dennis Moon. I found that the two hairs from the shirt, a red hair and a red-brown hair were similar in microscopic characteristics to the hairs in this particular vial.

. . . . .

[fol. 158] DIRECT EXAMINATION

BY MR. WOOD:

Q. Now, Mr. First, would you give your full name and address, please?

A Russell Allen Foot, 213 Ethan Allen Avenue, Takoma Park, Maryland.

. . . . .

[fol. 159] Q Now, did there come a time when you and [fol. 160] the defendant Moon decided to be roommates?

A Yes.

Q And when was that?

A About four months later.

Q And where did you live then?

A Before?

Q Yes. Where did you all start rooming together?

A We started rooming together at apartments on Powder Mill Road in Beltsville.

Q Do you remember the name of those apartments?

A Powder Mill Village.

Q And were you living there on the 18th of May, 1964?

A Yes, I was.

. . . . .

[fol. 167] Q Now directing your attention again, Mr. Foot, to State's Exhibit Number Eight; is this the condition of this tape when you left that morning

A No, it is not.

Q the 18th of May, 1964?

A No, it is not.

Q What was the condition of that roll of tape when you left the morning of May 18, 1964?

A It was a full roll.

Q And when you found it on the 19th in the trashcan, what condition was it in then?

A Almost all completely gone.

. . . . .

[fol. 186] (Witness leaves the stand)

MR. WOOD: Approach the Bench?

(Bench conference reported as follows:)

MR. WOOD: I'd like to call now Carol Shanahan.

THE COURT: What for?

MR. WOOD: I have plenty of law backing me up. To read his formal judicial confession.

THE COURT: Let me see your law?
MR. WOOD: Yes, sir.

* * * *

THE COURT: All right, Mr. State's Attorney, I will hear you on this question.
[fol. 187] MR. WOOD: Please the Court
THE COURT: What page in Underhill's Criminal Evidence are you referring to?
MR. WOOD: Underhill, Chapter 16, Section 160 at page 291
MR. NOYES: Two what?
MR. WOOD: Nine one.
It please the Court, on December 17, 1964, a trial was had in this Court before Judge Anderson; a court reporter was present and the defendant was present, his attorney, his competent attorney was present
THE COURT: Get me 51 Fed. 2nd.
MR. WOOD: I have it, Your Honor.

(Book handed to the Court by Mr. Wood)

(Whereupon, Mr. Wood argues before the Court)

(Whereupon, Mr. Noyes argues before the Court)

THE COURT: Pretty close question. I am going to resolve it in favor of the defendant.
Objection sustained.

* * * *

[fol. 189] MR. NOYES: Well, Your Honor, first of all, the defendant rests we rest. We offer no evidence.
We are moving for judgment of acquittal on all of the counts, on the simple basis the State has not proven the corpus delicti.

* * * *

[fol. 200] MR. NOYES: Your Honor the State has this man's record, he has been in difficulty before, of course, but that is a matter of public record, and I would ask the State to produce the record if they have it.

(Papers handed to Mr. Noyes by Mr. Wood)

MR. NOYES: I can't decipher these things, Judge. Perhaps Detective Cobb could enlighten the Court in just what this man's background is.

DETECTIVE COBB: I will try to, Your Honor.

THE COURT: Let me have it, I can read it.

MR. NOYES: Lot of entries on there that aren't necessarily convictions.

MR. WOOD: The Court can read his testimony.

MR. NOYES: As I said, they appear.

MR. WOOD: He gave his record in his prior trial.

MR. NOYES: He did.

DETECTIVE COBB: Page one hundred thirty-eight.

(Pause while counsel look through papers)

(Further discussion off the record)

MR. NOYES: Would Your Honor care to hear from the defendant?

THE COURT: It is up to you; not what I want.

WHEREUPON,

DENNIS M. MOON

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NOYES:

Q Now, speak up, if you will. You are Dennis M. [fol. 201] Moon, the defendant in this case?

A Yes, sir.

Q And I want to clarify one point, Mr. Moon, for the record.

You expressed dissatisfaction with the previous attorney appointed by the Court and he was allowed to withdraw and I was appointed in his place. Now, if you have got anything to say about the way I handled this case, if there is anything you are dissatisfied about I would like you to tell the Court now and tell me at this time, if you are satisfied with the way you were represented.

A I am satisfied with what you did.

Q Nothing you believe I should have done that I didn't do?

A No, sir.

Q All right.

Now you have been convicted. You previously were convicted in this case of just the robbery, weren't you?

A Yes.

Q You weren't convict of course, the assault with intent to kill wasn't tried, was it? You weren't tried on that count, were you?

A No, just six counts. I don't know which ones they were.

Q You weren't found guilty of larceny the last time, were you, either?

A No.

Q Just the armed robbery?

[fol. 202] A Yes.

Q Judge Anderson gave you twelve years?

A Yes.

Q You have actually been in jail about two years? In other words, you have been in jail since when, August of '64?

A No, it was sometime in the middle of June.

Q You were picked up in the middle of June of '64; so you have been in jail about two years?

A Yes, sir.

Q And you are presently incarcerated in the Maryland State Penitentiary?

A Yes, sir.

Q And you receive treatments every day for your leg, do you not?

A Yes, sir.

Q They going to fit you up with a leg over there?

A Yes, sir.

Q Now I would like you to tell Judge Pugh anything you want to say to him as to why he should give you leniency in this case, with the understanding that, by my calculations, these offenses totalled could amount to fifty-three years—eighteen on the assault with intent to kill; I believe it is eighteen, and twenty on the robbery with a deadly weapon, and fifteen on the larceny. Now

you can tell the Court what reason, if any, that he should be lenient with you.

A It is the fact I didn't commit the crime.

Q You say you didn't get the money?

[fol. 203] A I didn't get the money; I didn't hit this woman.

Q You didn't hit the woman?

A No, sir. The fact is I don't ever recall being there that day.

Q Pardon?

A I don't even recall being there that day.

Q Do you remember you testified at your previous trial? You did testify, didn't you?

A I was rather high.

Q I'll get to that. But you did testify at the previous trial, didn't you?

A Yes, sir.

Q And you got on the stand and you admitted hitting this woman, didn't you? You remember hitting the woman the last trial?

A No, sir.

Q You don't remember that?

A No, sir.

Q What do you mean you were high?

A Well, they had me in the hospital for this leg, and I was receiving narcotic drugs for pain.

Q Had your leg been amputated at the last trial?

A No, sir.

Q But you were having trouble with your leg at that time?

A Yes, sir. I had a very bad infection in it.

Q You say you were taking narcotics?

A Yes, sir.

[fol. 204] Q What kind of narcotic?

A I don't know. Something to ease the pain. Giving me shots and pills.

Q You know what it was?

A I believe it was demarol.

Q How long before the trial had you had some of this demarol?

A I got a shot about a half hour before I came down here.

Q Of course you didn't testify until late in the trial, did you?

A It was in the afternoon sometime.

Q You got a shot in the morning and you testified in the afternoon?

A Yes, sir.

MR. NOYES: I have nothing further.

Perhaps the Court might want to say something.

THE COURT: You say you didn't commit the crime?

THE WITNESS: No, sir, I didn't.

THE COURT: Or you don't remember committing it?

THE WITNESS: Sir?

THE COURT: Or you don't remember committing it?

THE WITNESS: I was at a party the night before, but I wasn't that drunk that I don't think that I would not remember something like that happening.

THE COURT: How did you get down to Florida?

THE WITNESS: I drove.

THE COURT: When did you drive?

(fol. 205) THE WITNESS: When did I drive?

THE COURT: Yes.

THE WITNESS: Well, I left the house about nine o'clock, I guess.

THE COURT: What day?

THE WITNESS: The 18th.

THE COURT: 18th?

THE WITNESS: Yes, sir.

THE COURT: Nine o'clock in the morning you left?

THE WITNESS: Yes, sir.

THE COURT: Pack up all your clothes?

THE WITNESS: Yes, sir. They were already packed up.

THE COURT: Already packed up.

All right, anything else?

MR. NOYES: I have nothing further, Your Honor.

THE COURT: All right, Dennis Mullene Moon, stand up.

Do you have any reason to assign why the Court should not proceed to sentence you in Number 7640 Criminals,

wherein the jury has found you guilty of robbery with a deadly weapon under the first count, and guilty of larceny under the sixth count of that indictment? Anything you want to say?

THE DEFENDANT: I have already said it, sir.

THE COURT: You have nothing else you want to say?

THE DEFENDANT: No, sir.

THE COURT: The Court agrees with the verdict of the jury. The verdict was proper, according to the evidence, in the Court's opinion.

It is the sentence of this Court, under count number [fol. 206] one, that you be confined to the Maryland Penitentiary for a period of twenty years.

It is the sentence of this Court that under count number six of the indictment that you be confined to the Maryland Penitentiary for a period of ten years.

The sentence under count number six to be suspended on the condition that when you are released from your sentence under count number one that you will remain on good behavior and not get in any trouble any more.

Do you have any reason to assign why the Court should not proceed to sentence you in Number 7639 Criminals, wherein the jury found you guilty of assault with intent to kill and murder?

THE DEFENDANT: No, sir.

THE COURT: Anything you want to say?

THE DEFENDANT: No.

THE COURT: It is the sentence of this Court you be confined to the Maryland Penitentiary for a period of ten years under that count. The sentence under that to be suspended on the condition you remain on good behavior when you are released under the sentence in count number one in 7640. That means that when and if you are paroled, or when you are released from your twenty year sentence under count number one, that you will have two suspended sentences hanging over you, and if you get in any trouble again you will be brought back and sent to the penitentiary for a period of ten years on each of those counts.

Take charge of him, sheriff.

[fol. 207] MR. NOYES: Your Honor, when does the twenty years begin?

THE COURT: The sentence will begin the date you were put in jail, June—what is the date? Give me the exact date. June, 1964?

DETECTIVE COBB: One moment, sir.

THE COURT: Just a minute, the detective has it.

MR. WOOD: The Court has the FBI record.

DETECTIVE COBB: It states on there the day he was picked up by the U. S. Marshal.

THE COURT: You mean the fugitive, June 2nd, 1964.

Sentence to run from June 2nd, 1964.

(Whereupon, at 4:20 o'clock p.m., June 7, 1966, this hearing was concluded.)

* * * * *

SUPREME COURT OF THE UNITED STATES

No. 515 Misc., October Term, 1968

DENNIS MULLENE MOON, PETITIONER

v.

MARYLAND

On petition for writ of Certiorari to the Court of Appeals of the State of Maryland.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 23, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1555, placed on the summary calendar and set for oral argument immediately following No. 477. In addition to the questions presented by the petition, counsel are requested to brief and argue the question of retroactivity of North Carolina v. Pearce, 395 U.S. ——, and Simpson v. Rice, 395 U.S. —— decided this date.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1969 O—350-424

SUPREME COURT, U. S.

AUG 11 1969

CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 267

[redacted],

Petitioner,

vs.

[redacted],

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR THE PETITIONER

[redacted]
[redacted]
[redacted]
[redacted]

Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 267

DENNIS MCGLENN MOOR,

Petitioner,

vs.

MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Maryland Court of Special Appeals is reported in 1 Md. App. 508, 232 A. 2d 277 (1967) and is appended at p. 15 of the Appendix herein. The opinion of the Maryland Court of Appeals is reported in 250 Md. 468, 243 A. 2d 561 (1968), and is appended at p. 18 of the Appendix herein.

Jurisdiction

The jurisdiction of this Honorable Court is invoked under Title 28 U.S.C., Sec. 1257 (3) and Rule 19B of the Rules of this Honorable Court.

Constitutional Provisions Involved

1. Amendment Five to the Constitution of the United States of America:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis supplied.)

2. Amendment Fourteen to the Constitution of the United States of America:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

I.

Should the decision of this Honorable Court in *North Carolina* v. *Pearce* and *Simpson* v. *Rice*, 395 U.S. ——, 23 L. Ed 2d 656, 89 S Ct 2072, decided June 23, 1969, be held to be retroactive?

II.

Are the decisions in *North Carolina* v. *Pearce*, *supra*, and *Simpson* v. *Rice*, *supra*, applicable to the instant case?

III.

Does the increase of sentence imposed upon the Petitioner at the conclusion of his second trial on the same offense for which he was formerly convicted constitute a violation of the double jeopardy provision of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

The Petitioner, Dennis Mullene Moore, was convicted on June 7, 1966, in the Circuit Court for Montgomery County, Maryland, after trial by jury, on Count One of Criminal Number 7640, which charged him with Armed Robbery, for which he was sentenced to twenty years imprisonment by Judge James Pugh; and on Count Six of Criminal Number

Summary of the Argument

ARGUMENT

POINT I

This Court's Decision in North Carolina v. Pearce and Simpson v. Rice, 395 U.S. ___, 23 L. Ed 2d 656, 89 S. Ct. 2072 (1969) Should Be Held to Be Fully Retroactive.

A new principle may have been formulated by this Court in the recent decision in *Jenkins v. Delaware*, [illegible] in which this Court seems to have extended its decision in *Johnson v. New Jersey*, *supra*, by holding that a defendant convicted before the decision in *Miranda v. Arizona*, *supra*, but whose second trial after a successful appeal took place after the *Miranda* decision, was not entitled to the benefits of the *Miranda* decision.

In Footnote 7 to *Jenkins v. Delaware*, *supra*, the Court appears to be approaching as a new criteria the point of initial reliance, presumably by law enforcement officials, it would appear, therefore, to be distinguished from the instant case. It might be said that the Court seems to be adopting a strictly philosophy on the principle of retroactivity when it says:

> "For initial approach to prospective decision making has undergone some modifications. Compare Linkletter v. Walker, [citation omitted] with Desist v. United States, [citation omitted]. With reluctance we began placing increasing emphasis upon the point at which law enforcement officials relied upon precedent and its overruling, and more recently we have adopted the point of initial reliance. See, e.g., Desist v. United States, *supra*; Stovall v. Denno, [citation omitted]. In addition to being more consistent with the [illegible] application to non-[illegible] constitutional principles retroactively, this latest approach has the [illegible] effect [illegible] treatment of retrials."

and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved . . . we must determine retroactivity 'on each case by looking to the peculiar traits of the specific rule in question' " (citations omitted).

Normally, of course, the prior history of the rule in question would be a significant factor, but in the instant case, there is no prior history, since the argument presented in *North Carolina v. Pearce* and *Simpson v. Rice* is really a case of first impression in this Court. Of course, this Court's decision in *Stroud v. United States*, 251 U.S. 15, 64 L. Ed. 103, 40 S. Ct. 50, rev'g 251 F. 38, 163 C.C.A. 252 (1918), and *Stroud v. United States*, 255 U.S. 562, 65 L. Ed. 787, 41 S. Ct. 380 (1921), has been cited to the State of Maryland in prior state appellate proceedings, but it is submitted that this case is not directly in point, as will be discussed later. It would therefore appear that petitioner has been denied in previous cases on this point where decisions went both ways. See, for instance, *Patton v. North Carolina*, 381 F. 2d 636 (C.A. 4th Cir. 1967), cert. den. 390 U.S. 905, 19 L. Ed. 2d 831, 88 S. Ct. 819 (1968); *United States ex rel. Sizemore v. Russell*, 378 F. 2d 588 (C.A. 4th Cir. 1967), cert. den. 389 U.S. 880 and 19 L. Ed. 2d 180, 88 S. Ct. 176, reh. den. 389 U.S. 987, 19 L. Ed. 2d 501, 88 S. Ct. 488 (1967); *United States v. Hall*, 384 F. 2d 445, 19 L. Ed. 2d 1, 88 S. Ct. 1962), cert. den. 390 U.S. 1036, 19 L. Ed. 2d 1, 88 S. Ct. 1421 (1968). The issue in question had never been squarely decided by this Court prior to *North Carolina v. Pearce*, *supra*, and *Simpson v. Rice*, *supra*.

The only criteria in the opinion for the overruling decision, and the purpose of *North Carolina v. Pearce*, as

again and seems to recognize the enormous burden involved in securing successful retrial due to the absence of witnesses, unavailability of records, etc. As the Court said in *Linkletter*, 381 U.S. at 637, "Reparation comes too late." The Court also laid great stress on the fact that the overruling decision, in *Mapp v. Ohio*, *supra*, had no bearing on guilt or innocence, which appears to be a matter of primary importance.

It is true that in *Stovall v. Denno*, *supra*, the Court cited *Johnson v. New Jersey*, *supra*, to the effect that "these cases establish the principle that in criminal litigation concerning constitutional claims, the Court may in the interest of justice make the rule prospective where the exigencies of the situation require such an application." *Johnson v. New Jersey*, 384 U.S. at 726-27, 16 L.Ed.2d at 888. There is nothing in *North Carolina v. Pearce*, *supra*, which requires such an application. The disruptive effect would be minimal, and it most certainly would clarify without harm to the State an egregious injustice to the individual [successful appellants] who have learned the hard way about the risks inherent in American criminal justice. The purpose of the new law is salutary. It will improve the caliber of justice in both the State and Federal Courts by encouraging defendants to appeal incorrect decisions without having to worry about being punished for the exercise of their constitutional rights. It will serve as a bulwark to the appellate system in this country, since primarily by appeals are the decisions formulated which clarify and improve the level of criminal justice in this country. This Court, after all, sits as a court of last resort for the criminal appellant and it is only through the defendant having an incentive to appeal

". . . . It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime as far as common law gave that protection. . . . Id., page 170

". . . . For what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict. Why is it that having once been tried and found guilty, he can never be tried again for that offense. Manifestly it is not the danger of jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. . . . Id., page 173."

B. An Absolutely Unfettered Right to Appeal in Criminal Cases Will Improve the Caliber of Criminal Justice in the United States.

In his dissenting opinion in *United States* v. *Ewell*, 383 U.S. 116, 15 L.Ed.2d 627, 86 S.Ct. 773 (1966), Mr. Justice Fortas stated in 383 U.S. at pages 127-128:

"In a different setting this Court has vividly criticized the Government's attempt to penalize a successful appellant by retrying him on an aggravated basis. *Green* v. *United States*, 355 U.S. 184, 2 L.Ed.2d 199, 78 S.Ct. 221, 61 A.L.R.2d 1119. Although the decision in Green was premised upon the Double Jeopardy Clause, its teaching has another dimension. Green also demonstrates this Court's concern to protect the right of appeal in criminal cases. It teaches that the Government, in its role as prosecutor may not attach

to the exercise of the right to appeal the penalty that if the appellant succeeds, he may be retried on another and more serious charge. Mr. Justice Black, speaking for the Court in Green, said "The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." 355 U.S. at 193, 2 L. Ed 2d at 208, 81 A.L.R 2d 1119."

It is perfectly obvious that a criminal appellate system operates for the benefit of the defendant. However, it is submitted that appellate proceedings also serve the public good, because criminal appeals are the most effective means of correcting trial errors of evidence and procedure as well as clarifying incorrect interpretations of the law. Indeed, it may be that the benefit to the public outweighs the benefit to the individual appellant. Of course, the State of Maryland has continuously held that Dennis Moon fully deserved the harsher punishment that was imposed at his second trial. Even assuming this to be true, it is entirely irrelevant to the broader constitutional issues presented in this matter. The petitioner's character is totally irrelevant in so far as the Bill of Rights is concerned. This Court has always recognized that principle as was stated by Mr. Justice Frankfurter in *United States* v. *Rabinowitz*, 339 U.S. 56, 69, 94 L. Ed 653, at p. 662 "It is a fair summary of history to say that safeguards of liberty have frequently been forged in controversies involving not very nice people."

It is an undeniable fact that a large percentage of appeals filed in criminal cases are without substantial merit. It is also undeniable that in light of *North Carolina* v. *Pearce*, *supra*, the number of appeals will probably increase,

because many defendants will feel that they have nothing to lose. On the other hand, the petitioner believes it equally undeniable that in many cases where substantial legal error was committed, the defendant has not appealed because of fears about increased sentences. It cannot be emphasized enough that it is through constant scrutiny and review of our administration of criminal justice that our judiciary and our judicial processes are being improved and held accountable. Any experienced criminal lawyer knows of numerous cases in which the defendant was factually guilty, but was found legally guilty through erroneous rulings of evidence and misinterpretation of the law. Quite often, relatively lenient sentences have been enough to deter an appeal. The reason for this is very basic in our system of criminal justice, and really is the heart of the petitioner's argument. The blunt truth of the matter is that many criminal defendants are interested in the outcome of the trial only in so far as it affects punishment. For them, the ultimate reality of the entire criminal trial procedure is not the verdict, but the sentence. Questions of legal error are important to him only as a means of avoiding punishment. In the last analysis, all he really cares about is the result.

The petitioner maintains that through an unfettered appellate system, confidence in our criminal justice among defendants and among the general public, will be substantially enhanced. As the number of appeals increases, then the answer is to improve our appellate facilities, not impair the right to appeal. It is inconceivable that the State could justify a patently unconstitutional procedure on the basis of administrative difficulties and expense.

C. The Prohibition Against Multiple Punishment as Formulated in *Ex parte Lange*, *supra*, and Reaffirmed in *North Carolina* v. *Pearce*, *supra*, Is Indistinguishable From a Prohibition Against Increased Punishments.

It cost Dennis Mullene Moon an additional eight years imprisonment for exercising the constitutional right to appeal, which the State of Maryland afforded him, and which it invited him to exercise. It is true that Dennis Moon did not have to appeal. At least, it is true in the sense that a man does not have to breathe either. So the petitioner was punished for appealing. It may not have been intentional and it may not have been as a result of any malice or evil motivation by the second trial judge. In fact, it could even be said that the second trial judge exercised some leniency towards the petitioner, since he did, after all, suspend the two additional ten year sentences on charges for which the petitioner was convicted at his second trial which were not part of his first trial. It may even be that the petitioner fully deserved the sentence imposed by Judge Pugh, and perhaps deserved even more. But, be that as it may, and apart from all explanations and legal realizations concerning waiver, de novo proceedings, etc., Dennis Moon is now serving eight additional years in prison as a direct result of appealing.

If Judge Pugh had given the petitioner ten years imprisonment for armed robbery and then given him an additional ten years for the same armed robbery, every appellate Court, whether Federal or State, in this country would have struck down the sentences as being patently multiple punishments. The distinction between two ten year sentences and one twenty year sentence seems to

the petitioner non existent. It is, to quote Henry Fielding in *Tom Jones*, Book 6, Chapter 13, "A distinction without a difference."

In its opinion, the Maryland Court of Appeals attempts to distinguish between the *Moon* opinion and the decision of the Maryland Court of Special Appeals in *Reeves v. State*, 3 Md. App. 195, 238 A. 2d 307 (1968). The hard fact of the matter, however, is that the cases are not distinguishable. In *Reeves*, the appellant was given the maximum sentence upon retrial after having served some six years on a prior sentence for the same offense. If the Maryland Courts were to be completely consistent on their reasoning in this matter, they should agree that the serving of twenty-six years imprisonment on a twenty year sentence is entirely permissible, since Reeves, after all, had obtained a new trial and a new sentence. Under Article 5, Section 21A of the *Annotated Code of Maryland, 1957 Edition, 1968 Replacement Volume*, the State had the right to petition the Maryland Court of Appeals for a Writ of Certiorari in the *Reeves* case, which it did. That Court denied the State's petition. It would appear to the Petitioner that this would have been the ideal case for the Court of Appeals to uphold the rationale of the *Moon* decision, *supra*, since the same argument concerning de novo proceedings and waiver applied in both cases.

That the ultimate reality in criminal proceedings is the sentence rather than the conviction, is shown by the case of *Cuicci v. Illinois*, 356 U.S. 571, 2 L. Ed 2d 983, 78 S.Ct 839 (1958). In that case, having obtained two successful convictions on different victims of a multiple murder, the prosecution then went ahead with a third trial because it simply was not satisfied with the sentences from the first

two trials. However, if Cinci had been sentenced to death, at his first trial, no sophisticated person would have expected any further proceedings in the matter.

In a recent decision, *Williams* v. *Oklahoma City*, 394 U.S. ——, 23 L. Ed 2d 440, 89 S Ct 1818 (1969), this Court, by way of dictum on another point, stated: "The Court has never held that States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the Courts (citations omitted)." As one example of unequal access, consider a defendant who is given a maximum sentence at his first trial. He would normally appeal merely as a matter of routine. A defendant receiving anything less that the maximum sentence, however, would appeal at his peril. Even under *Pearce*, an appellant might think twice about prosecuting his appeal. This certainly is not the "open and equal access to the Courts" envisioned in *Williams*.

Consider the following hypothetical situation. A defendant is convicted and sentenced to a relatively short sentence which he immediately begins to serve. An appeal is timely noted and some months later his conviction is reversed. In the meantime, the defendant has served the sentence imposed, but proceeds with his appeal. Would the State of Maryland argue that upon the defendant's reconviction a second sentence would not be a violation of the prohibition against multiple punishments? It would seem to be particularly logical in light of the de novo theory of which the State is so fond.

Your petitioner now urges this Honorable Court to go to the very substance of the double jeopardy provision.

In his brilliant study entitled, "*The Origins of the Fifth Amendment*", Leonard W. Levy traces the long and bitter struggle to carve out a prohibition against self incrimination, a struggle which is not yet completely over. Although the double jeopardy question is treated only incidentally to his main thesis, it is obvious that in any study of English common law and its evolution through American law, that the theme of crime and punishment is repeated over and over. Indeed, the two are inseparably linked in law, history, and, indeed, literature. It is urged that the true meaning of jeopardy is not the jeopardy of being tried twice, for there is no real harm in the trial itself. The jeopardy really attaches to the punishment, and it is submitted that this was the true intention of James Madison when he virtually wrote the Bill of Rights for the first session of the first Congress of the United States. See the separate concurring opinion of Mr. Justice Douglas and Mr. Justice Marshall, *North Carolina* v. *Pearce*, 395 U.S. at ——.

Of course, the State of Maryland may maintain that this is stretching the meaning of the term "jeopardy", but *Ex parte Lange, supra*, makes clear this Court's long standing concern in this area and its awareness of the inseparable connection between trial and punishment, and this brief can conclude with no better summary of this concern than from that decision (at p. 178):

> "There is no more sacred duty of a court than, in a case properly before it, to maintain those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and at such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

Conclusion

Based on the foregoing reasons, this Honorable Court's recent decision in *North Carolina* v. *Pearce*, *supra*, should be held fully retroactive, and this Honorable Court is further urged to hold that any increase of sentence at a subsequent trial, after a successful appeal of a prior conviction, should be held to violate the double jeopardy clause of the Fifth Amendment. Consequently, a Writ of Certiorari should issue to the Court of Appeals of Maryland, ordering them to take the appropriate measures necessary to implement this Court's opinion.

Respectfully submitted,

Robert Anthony Jacques
County Federal Savings Building
114 Commerce Lane
Rockville, Maryland 20850
Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 267

DENNIS MULKNE MOON

Petitioner

v.

STATE OF MARYLAND

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

FRANCIS B. BURCH
Attorney General of Maryland

EDWARD F. BOWERSOX
Assistant Attorney General
of Maryland
Chief, Criminal Division
1200 One Charles Center
Baltimore, Maryland 21201
For Respondent

The Daily Record Co., Baltimore, Md. 21201

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 267

DENNIS MULLENE MOON,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland (A. 15-16) entered on August 2, 1967, is reported in 1 Md. App. 569, 232 A. 2d 277 (1967). Petitioner was granted certiorari by the Court of Appeals of Maryland and its opinion (A. 18 to 31) dated July 3, 1968, is reported in 250 Md. 488, 244 A. 2d 564 (1968).

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioner's Brief.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Amendment Five to the Constitution of the United States of America

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis supplied)

2. Amendment Fourteen to the Constitution of the United States of America

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I

Should the decision of this Honorable Court in *North Carolina v. Pearce* and *Simpson v. Rice*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072, decided June 23, 1969, be held to be retroactive?

II.

Are the decisions in *North Carolina v. Pearce*, *supra*, and *Simpson v. Rice*, *supra*, applicable to the instant case?

III.

Does the increase of sentence imposed upon the Petitioner at the conclusion of his second trial on the same offense for which he was formerly convicted constitute a violation of the double jeopardy provision of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

While no question is raised as to the Petitioner's guilt the Respondent believes a factual outline is essential to the issue of this case.

Prosecution in this case was for the robbery with a dangerous and deadly weapon and assault with intent to murder of a female hardware store clerk who was making a deposit of receipts. The victim, Patricia Hinkel, an employee of Poch Hardware located in the Congressional Shopping Center, Rockville, was walking to the American National Bank, located in the same shopping center, at about 11:30 A.M. on May 18, 1964, when Petitioner struck her about the head with a tape-covered pipe and stole the receipts amounting to more than $450. Petitioner was a former employee of Poch Hardware. He knew Mrs. Hinkel well and she knew him. He was familiar with the procedure for depositing receipts and had performed that service personally.

The beating inflicted on Mrs. Hinkel was so severe that she was unconscious for three days. According to medical testimony introduced at the Petitioner's second trial, the

SUMMARY OF THE ARGUMENT

The decisions of this Honourable Court in Pearce and Stevenson should not be held to be retrospective

a) Retroactivity generally whereas such would be the instance of the trial the very integrity of the fact finding process Linkletter v Walker Mishkin v New York Roberts v Russell Arsenault v Massachusetts etc Such factors not present in Pearce and Simpson

b) Non Retroactivity of Pearce Simpson supported by Linkletter v Walker Tehan v Shott Johnson v New Jersey Jenkins v Delaware Stovall v Denno Desist v United States Halliday v United States

c) Similarity of purpose between Pearce Simpson rule and rule in McCarthy v United States

d) Reliance of Maryland and other jurisdictions on old rule Desist v United States Hankin v State Mitchell v State

e) To apply rule retroactively would impose an unjustifiable burden on administration of justice Procedural problems that would arise the absence of witnesses dimming of memory etc

II

Assuming that the Rule enunciated in Pearce and Simpson is not retroactive the sentence of the Petitioner does not violate the Fourteenth Amendment

a) Due process requires vindictiveness play no part in actual sentence not fear of such vindictiveness in defendant exercising his right to appeal Pearce and Simpson

b) Presumption of vindictiveness not part of vindictiveness played part in petitioner's sentence it should be set aside

III

Increased sentence of the Petitioner does not constitute a violation of the Double Jeopardy Provision of the Fifth Amendment and Fourteenth Amendment

a. Double Jeopardy clause enforcement against the states *Benton v. Maryland*

b. Double Jeopardy clause requires credit for time served under first sentence *Pearce* and *Simpson*

c. The petitioner received credit for time served under his first sentence plus seven months for which he was incarcerated pending his first trial

d. That increased punishment at second trial is not violative of double jeopardy clause was answered clearly and emphatically by *Pearce* and *Simpson*

ARGUMENT

I.

[illegible] *NORTH CAROLINA v. PEARCE AND SIMPSON* [illegible]
[illegible]

At the end of the first term of this Honorable Court it was held in *North Carolina v. Pearce and Simpson* that whenever a judge imposes a more severe sentence upon a defendant after a new trial the reasons for his doing so must affirmatively appear. It was further stated that those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

The new procedural requirements announced applied to future cases. It was to be applied retroactively or prospectively. It was interpreted that it was a violation

of the due process clause of the Fourteenth Amendment of the Constitution of the United States to vindictively punish with more severe sentences those who successfully seek retrials, and that the only way fear of such vindictiveness can be said to be alleviated and the channels of appeal kept open was to require that judges state their reasons for the harsher sentence. The Respondent State of Maryland recognizes that the chilling effect of such apprehension is unconstitutional and that such retaliatory motives are reprehensible and indefensible. The purpose to be served by this new rule is entirely prophylactic in effect and therefore in consonance with prior decisions of this Court is particularly adaptable to prospective application. This is completely borne out by Mr. Justice Stewart speaking for the court in Pearce and Simpson where he states at 395 U.S.

> In order to ensure the absence of such a motivation we have concluded . . . There are no issues of fact determination or guilt determination involved in this case . . . so as to help insure the fairness of the sentencing process and to encourage the taking of appeals.

It was established in Linkletter v. Walker, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965) that the Constitution neither prohibits nor requires retrospective effect for decisions expounding new constitutional rules of criminal procedure. A year later in Johnson v. New Jersey, 384 U.S. 719, 720-721, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966) this Honorable Court stressed (1) that the choice between retroactivity and non-retroactivity is to be made in light of the value of the constitutional guarantee involved and (2) that the retroactivity or non-retroactivity of the rule is not automatically determined by the provision of the Constitution on which the decision is based.

Thereafter in *Desist v. United States*, 394 U.S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030 (1969), this Court stated that it viewed the retroactivity or non-retroactivity of such decisions as a function of three considerations. These considerations were summarized in *Stovall v. Denno*, 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967 (1967):

> "(a) The purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authority on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

It is noted that these criteria are a refinement of what this Honorable Court said in *Linkletter v. Walker*, 381 U.S. at page 629.

> "Weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation."

The application of new standards of justice retroactively has been generally in those cases where the new rule went to the fairness of the trial — the very integrity of the fact finding process. *Linkletter v. Walker*, at 639. This test of appropriateness was said to call for retroactivity where the error went to the basis of a fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination of guilt or innocence. *Roberts v. Russell*, 392 U.S. 293, 294, 20 L. Ed. 2d 1355, 88 S. Ct. 1921 (1968). The recent cases which have been retroactively applied bear out this statement. *Jackson v. Denno*, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964) (holding retroactive *Massiah v. United States*, 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964) which concerned the necessity of counsel at sentencing). *Roberts v. Russell*, which held retroactive *Bruton v. United States*, 391 U.S. 123, 20

L. Ed. 2d 476, 88 S. Ct. 1620 (1968), which concerned the admission at a joint trial of an extrajudicial confession by one defendant implicating a co-defendant; *Arsenault v. Massachusetts*, 393 U.S. 5, 21 L. Ed. 2d 5, 89 S. Ct. 35 (1968), which held *White v. Maryland*, 373 U.S. 59, 10 L. Ed. 2d 193, 83 S. Ct. 1050 (1957), concerning the right to counsel at a preliminary hearing to apply retroactively; *Berger v. California*, 393 U.S. 314, 21 L. Ed. 2d 809, 89 S. Ct. 540 (1969), holding retroactive *Barber v. Page*, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968), which discussed the use of an absent witness's testimony; and also see *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963); *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956); *Jackson v. Denno*, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964). These cases all concerned the fairness of the trial and were designed to protect the defendant from an unfair adjudication of guilt. No such factors are present under the circumstances of *Pearce* and *Simpson* which are at question herein.

Prospectivity has been given application by this Honorable Court under several different categories, each to fit the parameters of the individual situations. Some such rules are to be applied to all cases which had not become final prior to the announcement of the decision. *Linkletter v. Walker*, *Tehan v. Shott*, 382 U.S. 406, 15 L. Ed. 2d 453, 86 S. Ct. 459, rehearing denied, 383 U.S. 931, 15 L. Ed. 2d 850, 86 S. Ct. 925 (1966). Other new rules are to be applied to cases in which the tainted evidence has not yet been introduced at trial. *Fuller v. Alaska*, 393 U.S. 80, 21 L. Ed. 2d 212, 89 S. Ct. 61 (1968), while others are applied to trials begun after the new rule was announced. *Johnson v. New Jersey*, *Stovall v. Denno*, *DeStefano v. Woods*, 392 U.S. 631, 20 L. Ed. 2d 1308, 88 S. Ct. 2087 (1968); *Jenkins v. Delaware*, 395 U.S. 213, 23 L. Ed. 2d 253, 89 S. Ct. 1611 (1969). And

yet another category of cases is to be applied retroactively to the Appellant and to all cases in the future in which the proscribed conduct has not yet taken place. It is readily seen that each case and the rule which was considered required a different application because of the obvious intrinsic peculiarities present therein.

In *Linkletter v. Walker*, dealing with *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, this Honorable Court said that the exclusionary rule enunciated need not be applied retroactively. The Court there held that the purpose of the rule would not be advanced by retroactivity since the misconduct could not be remedied with a new trial. The reliance by the states upon the rule of *Wolf v. Colorado*, 338 U.S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949), was considered as was the tremendous burden on the administration of justice which would result. Stating what effect retrospective application of *Mapp* would have the Court found:

> To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

When considering whether *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229, reh. den. 381 U.S. 957, 14 L. Ed. 2d 730, 85 S. Ct. 1797 (1965), should be given retroactive application in *Tehan v. Shott*, this Honorable Court held that the rule against adverse comment upon a defendant's failure to testify should not be applied retroactively. It was decided that the rule under *Griffin* enabled a "whole complex of values" and that it fulfilled "no single and distinct purpose" such as the rule of *Mapp v. Ohio* and that the Fifth Amendment privilege against self-incrimination does not relate to protecting the innocent from conviction but rather to preserving the integrity of a judicial system. *Tehan v. Shott*, 382 U.S. at 415.

the ascertainment of truth was not at issue. The Court stressed the heavy reliance on the rule of *Escobedo v. New Jersey*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). The strain which would result if *Escobedo* were given retroactive application was emphasized. The Court reasoned that the rule should be prospectively applied since those reaping the greatest benefit from a rule compelling retroactive application of *Escobedo* would be those under lengthy sentences imposed many years before *Escobedo*.

In considering whether or not the procedural safeguards set forth in *Escobedo v. Illinois*, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758 (1964), and in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), should be retroactively applied the Court held that those decisions were applicable only to those cases in which trials were begun after the decisions were announced. *Johnson v. New Jersey*. Regarding the new rules, the Court said, 384 U.S. at page 729, that:

> We are thus concerned with a question of prospectivity and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth determining process at trial.

The Honorable Court held that other safeguards existed to protect those who were not covered, stating at 384 U.S. 730 and 733, that:

> Prospective application only to trials begun after the standards were announced is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory.

In sum, the Court held that the purposes of the rule should be met in other ways than by retroactive application. It was further held that law enforcement agencies had justi-

and the resulting variance in the sentencing of defendants has been a cause of considerable recent concern in cases such as *Patton v. North Carolina*, 381 F. 2d 636 (4th Cir., 1967); *Marano v. United States*, 374 F. 2d 583 (1st Cir., 1967); and *United States ex rel. Starner v. South Carolina*, 378 F. 2d 808 (3rd Cir., 1967). The related question of whether a person who has overturned a conviction can receive a more severe sentence upon retrial was discussed by this Honorable Court in *Pearce* and *Simpson*. Mr. Justice Stewart, speaking for the Court therein, stated:

> "A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities: *Williams v. New York*, 337 U.S. 241, 245."

Although not overruling *Williams*, the Court held that due process required that where a more severe sentence is imposed upon a defendant after a new trial, the reasons for this judicial action must appear affirmatively. Explicit in this holding is a recognition that there is disparity in the sentencing procedures of the various courts of this nation. The language seems to be clearly cognizant of the fact that different judges view sentencing differently and

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with like background and propensity, may well reach a decision radically different from our own. Who is right?" 42 F.R.D. 224 (1968).

Also:

"Any single-valued approach to sentencing is misdirected. A sentence which is not in some fashion limited in accordance with the particular offense can lead to a system of incomparable brutality. Per contra, a sentence or pattern of sentences which fails to take due account of the gravity of the offense can seriously undermine respect for law." A.B.A. Sentencing Alternatives and Procedures, Project on Minimum Standards on Criminal Justice 1 (1967).

that upon retrial it is not unusual, unfair, or unconstitutional for a greater sentence to be imposed.

Williams v. New York, involved the question of whether or not a judge could consider outside information, such as post-conviction reports, in imposing sentence. The jury there had recommended life imprisonment; but the judge, acting at his discretion, imposed the death penalty, justifying his actions with information which was not available to the jury. The Court in *Williams* stated that:

> "Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. *People v. Johnson*, 252 N.Y. 387, 392, 169 N.E. 619. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."

The *Williams* decision recognizes the wide discretion which the Anglo-American legal system places in the trial judge at the time of sentencing. At page 246 is said:

> "But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law";

and at page 247:

> "[The trial judge's] task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined."

The Federal courts have consistently held that a sentence within the statutory limits is not unlawful and is a

matter for the sound discretion of the trial judge. For example, see *Castle v. United States*, 399 F. 2d 642 (5th Cir., 1968); *United States v. Dawson*, 400 F. 2d 194 (2d Cir., 1968); *Saunders v. South Carolina*, 296 F. Supp. 563 (D.C. S.C. 1969); and *Stevens v. Warden*, 382 F. 2d 429 (4th Cir., 1967).

The Petitioner Moon's sentences were within statutory limits, and his total punishment could have been longer if the trial judge had chosen so. Judge Pugh could have run his sentences consecutively rather than concurrently or suspending them. In any event, the sentences imposed by Judge Pugh, as compared to the sentences imposed against the Petitioner at his first trial, amplify the perplexities that are attendant to the problem of disparity of sentences.

G. *Reasons of Trial Judge for Sentence Are In Accordance With the Due Process Clause.*

However, the best available source from which to obtain information as to the reasons for the increased sentence is the trial court itself. Therefore, following what it considers a directive of this court in *Pearce* and *Simpson* that it is incumbent upon the State to offer reason or justification for the sentence beyond the power to impose it, the Attorney General's Office requested Judge James H. Pugh, Judge of the Circuit Court for Montgomery County, to prepare an affidavit setting forth his reasons for imposing the sentence in question. Said affidavit is self-explanatory, and is herein printed in full at pages 47 to 50 of this Brief and is marked as Respondent's Exhibit A. While it may be arguable that the reasons cited by Judge Pugh do not fall within the framework of the new rule enunciated by *Pearce* and *Simpson* — adopted three years after the sentence was imposed — it is not arguable that his reasons were in conformity with the practice and procedures of sentencing at the time of imposition. Furthermore, there

is no indication of "vindictiveness" against the petitioner for having secured a new trial. It is evident that said sentence did not and does not violate the due process clause of the Fourteenth Amendment.

III.

THE INCREASE OF SENTENCE IMPOSED UPON THE PETITIONER AT THE CONCLUSION OF HIS SECOND TRIAL ON THE SAME OFFENSE FOR WHICH HE WAS FORMERLY CONVICTED DOES NOT CONSTITUTE A VIOLATION OF THE DOUBLE JEOPARDY PROVISION OF THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

On June 23, 1969, this Honorable Court held in *Benton v. Maryland, ante,* page , that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. On the same day, this Honorable Court held in *Pearce* and *Simpson*, that the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction. (The Petitioner in his Brief at page 22 concedes this point.)

However, Mr. Justice Stewart in Part I of the opinion of the Court placed a limitation on the rule enunciated by *Pearce* and *Simpson* in consideration of the question whether, in the imposition of sentence for the same offense after retrial, the Constitution requires that credit must be given for punishment already endured. The opinion went on to state at 395 U.S. :

> "The Court stated the controlling constitutional principle almost 100 years ago, in the landmark case of *Ex parte Lange*, 18 Wall. 163, 168:
>
> > 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And . . . there has never been any doubt of [this rule's] entire and complete protection of the party

when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.'

* * * * * *

'[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.' *Id.*, at 173.

"We think it is clear that this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully 'credited' in imposing sentence upon a new conviction for the same offense. . . .

"We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense. If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned — by subtracting them from whatever new sentence is imposed."

In the case at bar, the Respondent, State of Maryland, has complied with this requirement of the Court. The Petitioner's sentence at the conclusion of his first trial began as of January 7, 1965, the date of sentencing (T. 2). At the conclusion of his second trial, the Petitioner's sentence was calculated as of his date of arrest, June 2, 1964 (T. 5) which was over seven months prior to the starting date of his first sentence. Therefore, the Petitioner received "credit" not only for the time served under his first sentence but also for the time he was incarcerated pending his first trial.

Other than the above, the Petitioner's third argument is answered clearly and emphatically by Part II-A of the

opinion in *North Carolina v. Pearce*, which states at 395 U.S. at

"A.

Long, established constitutional doctrine makes clear that, beyond the requirement already discussed, the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction. At least since 1896, when *United States v. Ball*, 163 U.S. 662, was decided, it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside. 'The principle that this provision does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurispurdence.' *United States v. Tateo*, 377 U.S. 463, 465. And at least since 1919, when *Stroud v. United States*, 251 U.S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction. 'That a defendant's conviction is overturned on collateral rather than direct attack is irrelevant for these purposes, see *Robinson v. United States*, 144 F. 2d 392, 396, 397, aff'd on another ground, 324 U.S. 282.' *United States v. Tateo*, *supra*, at 466.

Although the rationale for this 'well-established part of our constitutional jurisprudence' has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. As to whatever punishment has actually been suffered under the first conviction, that premise is, of course, an unmitigated fiction, as we have recognized in Part I of this opinion. But, so far as the conviction itself goes, and that part of the sentence that has not yet been served, it is no more than a simple statement of

fact to say that the slate has been wiped clean. The conviction *has* been set aside, and the unexpired portion of the original sentence will never be served. A new trial may result in an acquittal. But if it does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question. To hold to the contrary would be to cast doubt upon the whole validity of the basic principle enunciated in *United States v. Ball, supra*, and upon the unbroken line of decisions that have followed that principle for almost 75 years. We think those decisions are entirely sound; and we decline to depart from the concept they reflect.

CONCLUSION

For the foregoing reasons, this Honorable Court's decision in *Pearce* and *Simpson* should not be retroactive, and the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,

EDWARD F. BORGERDING,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
For Respondent.

RESPONDENT'S EXHIBIT "A"

In The Circuit Court for Montgomery County, Md.

Nos. 7639 and 7640

State of Maryland

vs.

Dennis Mullene Moon

At the request of the Attorney General of Maryland, made to me on the 30th day of September, 1969, I do hereby make the following statement:

On June 6th and 7th, 1966, I presided over the jury trial of Dennis Mullene Moon who was convicted under two indictments, No. 7639 and No. 7640, with the crimes of assault with intent to kill and murder (No. 7639 Criminals) and robbery with a deadly weapon and grand larceny (No. 7640 Criminals). At the request of the defendant's attorney, sentence was imposed after the return of the verdict, no request for a presentence investigation was made because such was not desired by defendant's attorney. At the sentencing I was informed that another Judge of this Court had sentenced the defendant to twelve years in the penal institution after his conviction of the crime of robbery with a deadly weapon. There was no trial under Criminals No. 7639 charging assault with intent to kill and murder, at the first trial. I was also aware of the fact that the defendant was given a retrial as a result of the decision of the Maryland Court of Appeals in the case of Schowgurow vs. State, 240 Md. 121. I sentenced the defendant

3. The defendant was tried and convicted of another offense at his trial, the crime of assault with intent to kill and murder, which sentence of ten years I suspended on condition that he remain on good behavior when he is released under the sentence of twenty years.

4. The defendant had previous convictions of house breaking and larceny for which he was sentenced to one year in Ft. Leavenworth, Kansas, in 1939, a conviction under the Dyer Act in Carson City, Nevada, in 1961 for which he was sentenced to three years, a conviction on April 13, 1961 under Title 18, Sec. 2312 in Las Vegas, Nevada, for which he was given three (3) years.

5. The defendant took the stand and under oath denied that he had struck the defendant. When his lawyer called to the defendant's attention that he took the stand in the previous trial and admitted hitting the victim, the defendant said he did not remember testifying that he hit the victim at the first trial, which I did not believe, and I was convinced that he had perjured himself at this sentencing, which I considered as identifiable misconduct on his part occurring after the time of the original sentence.

6. That on June 8, 1966, I refused to sign an order to have the defendant transferred from the Maryland Penitentiary to the Patuxent Institution for his evaluation as to whether or not he was a defective delinquent under Article 31B, Section 5 of the Code of Laws of Maryland stating that: The defendant has been sentenced to twenty years in the Penitentiary plus two ten year sentences which were suspended and the Court is of the opinion that the sentence of twenty years plus the two ten year suspended sentences is adequate and therefore no proceedings should be filed under the defective delinquency statute.

7. I had not read the transcript of the first trial and did not preside at the first trial, therefore did not know what facts and circumstances the first Trial Judge took into consideration in sentencing the defendant to twelve years.

Respectfully submitted,

JAMES H. PUGH,
Judge of the Circuit Court
for Montgomery County,
Maryland.

Subscribed and sworn to before me this 1st day of October, A.D., 1969.

BETTY RUTH BELCHER,
Notary Public, Maryland.

(Seal)